United States Court of Appeals

for the Second Circuit

APPENDIX

74-1947

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. [redacted]

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

HENRY STUART BROWN,

Defendant-Appellant.

On the Appeal from the United States District Court
for the Eastern District of New York

APPENDIX FOR THE APPELLANT

FREDERICK H. COHN, ESQ.
640 Broadway
New York, New York 10012
212-677-1552

Attorney for Appellant

UNITED STATES COURT OF APPEALS
FILED
NOV 1 1974
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

I N D E X

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D. C. Form No. 100
CRIMINAL DOCKET

73 CR 960

TITLE OF CASE

THE UNITED STATES

vs.

HENRY STUART BROWN

ATTORNEYS

For U. S.: Cleary

For Defendant: Frederick Cohn
640 Broadway, N.Y., N.Y.
677-1552

[illegible]k Robbery

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		7-11-74	Notice of Appeal (no fee)		
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
11/1/73	Before TRAVIA, J.:- Indictment filed
-7-73	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
-7-73	By MISHLER, CH J - Writ Issued, ret. Nov. 9, 1973.
11-9-73	By MISHLER, CH.J.- Case called- Deft and counsel present- Deft arraigned and enters a plea of not guilty- On consent of deft he is remanded without bail- Court appointed Frederick Cohen as counsel- 2/-18-74 set down for trial- 30 days for motions
11-9-73	By MISHLER, CH.J.- Order appointing counsel filed
-9-73	Govts Notice of Readiness for Trial filed.
11-13-73	Writ retd and filed- Executed (BROWN)
18-74	Notice of motion filed for discover, suppression, for an order granting the appointment of a fingerprint expert, and for dismissal of the indict-

DATE	PROCEEDINGS
1-30-74	Deft's memorandum in support of motion to dismiss filed
2-1-74	Before MISHER, CH J - Case called for dismissal-Motion argued and motion denied - April 1, 1974 for trial; Motion for suppressing evidence - Motion argued - hearing granted if to be used;motion for granting of a fingerprint expert, etc. motion argued - motion granted; motion for discovery - motion argued - granted in part and denied in part as indicated on the record.
-22-74	By MISHLER, CH J - Memorandum of Decision and Order filed denying defts motion for dismissal of the indictment.
3-27-74	By MISHLER, CH.J.- Certificate of Engagement filed that Frederick H. Co esq. is required to appear in this court to proceed to tiral on May 6, 1 at 10:00 A.M.
4-4-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Brown)
4-[illegible]74	By Mishler, Ch J - Writ issued, ret. 4-8-74
4-10-74	Writ retd and filed- Executed (Brown)
-23-74	Notice of Motion filed and defts Points and Authorities for an order directing that the U.S. Attorney that he may not use prior convictions of the deft to impeach his credibility, etc. (ret. 4-26-74 at 9:30 am.)
4-24-74	Govt's notice of appeal filed for an order directing the deft to provide scientific analyses. test. experiments. in relation to this prosecution.e ret. 4-26-74
4-25-74	Petition for writ of habeas corpus ad prosequendum filed
4-25-74	By MISHLER, CH.J.- Writ issued, ret, 4-26-74
4-26-74	Before MISHLER, CH.J.- Case called- Motion for an order directing U.S. at that he may not use prior convictions of deft to impeach his credibility argued- Motion granted on consent- Motion for aon order pursuant to Rule 16(c) argued- decision reserved
4-26-74	Writ retd and filed- executed
5-3-74	Stenographers Transcript dated 3-26-74 filed
-3-74	By MISHLER, CH.J.- Order filed that the District Attorney of Kings County turn over to A.U.S.A. Clarey the minutes of the testimony as to and indiv dual heard before the Grand Jury of Kings County on March 14, 1972, etc.
5-3-74	Petition for writ of habeas corpus ad prosequendum filed
5-3-74	By MISHLER,C H.J.-Writ issued, ret. 5-6-74
5-6-74	Before MISHLER,C H. J.- Case called- Deft and counsel present- Trial order and begun- Jurors selected and sworn-Trial contd to 5-7-74 at 10:00 A.M.
5-7-74	Writ retd and filed- executed

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CRIMINAL DOCKET

DATE	PROCEEDINGS
5-7-74	Before MISHLER, CH.J.- Case called- Deft and counsel present- Trial resumed- Trial contd to 5-8-74 at 10:00 A.M.
5-8-74	Before MISHLER, CH.J.- Case called- Deft and counsel present- Trial resumed-Govt rests-Motion by deft for a judgment of acquittal is denied Deft rests-Trial contd to 5-9-74 at 9:30 A.M.
5-9-74	Before MISHLER, CH J - case called - deft & counsel Frederick Cohen present - trial resumed - at 12:30 PM the Jury retired for deliberation - at 4:30 PM the Jury returned and rendered a verdict of guilty on count 2 - the jury did not have to consider count 1 - jury polled and discharged - all motions reserved to time of sentence - sentence adjd without date - trial concluded.
5-9-74	By MISHLER, CH J - Order of sustenance filed - lunch 18 persons.
5-13-74	Voucher for Expert Services filed.
5-16-74	Voucher for expert services filed
7-2-74	Petition for writ of habeas corpus ad prosequendum filed
7-2-74	By MISHLER, CH.J.- Writ issued, ret. 7-11-74
7-11-74	Before MISHLER, CH J - case called - deft & counsel Frederick Cohn present - deft sentenced to imprisonment for a period of 20 years on count 2 pursuant to 18:4208(a)(2). Said sentence to run consecutively with prison term now serving in the State of Missouri. Clerk to file Notice of Appeal without fee.
7-[illegible]-74	Judgment & Commitment filed - certified copies to Marshal.
7-11-74	Notice of Appeal filed (No fee)
7-11-74	Docket entries and duplicate of Notice of Appeal mailed to the C of A.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

CASE NO. 74 1947 | U.S.A. v. Henry Stuart Brown

DATE	FILINGS—PROCEEDINGS	Filed
7-12-74	Filed copies of docket entries and notice of appeal	
7-12-74	Filed Form A	
7-16-74	Filed CJA 20 continuing Frederick Cohen, Esq. as counsel for appellant Mailed copies to A.O. and counsel.	
7-16-74	Filed order: record by 7-31-74, w/dismissal in default; removal of record; seven(7) xerox copies of appellant's brief and appendix by 9-2-74, w/dismissal in default; U.S. brief and appendix, if any by 10-2-74; argument of appeal to be ready to be heard week of 10-7-74	
7-30-74	Filed record (Original papers of district court)	
8-12-74	Filed supplemental record (Original papers of district court)	
8-22-74	Filed motion for an extension of time to file appellant's brief and appendix.	
8-23-74	Filed affidavit of service, appellant	
9-16-74	Filed order amending order of this court dated 7-16-74 as follows: appellant's brief and appendix by 11-1-74 w/dismissal in default; U.S. brief by 12-2-74; argument week of 1-6-75	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

HENRY STUART BROWN,

Defendant.

----------x

INDICTMENT

Crim. No. 73CR960
(T.18,U.S.C.,§2113(a)(d) and §2)

Mishler, J.

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 10th day of January 1972, within the Eastern District of New York, the defendant HENRY STUART BROWN, knowingly, wilfully and feloniously, by force, violence and intimidation, took approximately Fourteen Thousand Seven Hundred and Forty Eight Dollars ($14,748.00) in United States currency from the persons and presence of employees of the Bankers Trust Company, 896 DeKalb Avenue, Brooklyn, New York, which money was in the care, custody, control, management and possession of the said Bankers Trust Company, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 2113(a) and Section 2)

COUNT TWO

On or about the 10th day of January 1972, within the Eastern District of New York, the defendant HENRY STUART BROWN knowingly, wilfully and feloniously by force, violence and intimidation, took approximately Fourteen Thousand Seven Hundred and Forty-Eight Dollars ($14,748.00) in United States currency from the persons and presence of employees of the Bankers Trust Company, 896 DeKalb Avenue, Brooklyn, New York, which money was in the care, custody, control, management and possession of the said Bankers Trust Company, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation, and in the commission of these acts, the defendant HENRY STUART BROWN assaulted and placed in jeopardy the lives of employees of the said Bankers Trust Company, by the use of a dangerous weapon. (Title 18, United States Code, Section 2113(d) and Section 2)

A TRUE BILL.

_____

Foreman

_____

United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
-against-	73 CR 960
HENRY STUART BROWN,	NOTICE OF MOTION
Defendant.	

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Frederick H. Cohn, attorney for defendant herein, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court, at a Motion Term, to be held before Hon. Jacob Mishler, U.S.D.J., on January 29th, 1974, at the United States Courthouse, 225 Cadman Plaza East, Brocklyn, New York, at 10:00 a.m. of that day, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, dismissing the indictment on the grounds that pre-indictment delay substantially prejudiced the defendant, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, N.Y.
January 11, 1974

Yours, etc.

Frederick H. Cohn
Attorney for defendant
640 Broadway
New York, New York 10012

TO:

EDWARD BOYD
Acting U.S. Attorney, E.D. of N.Y.
225 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
-against-	73 CR 960
HENRY STUART BROWN,	AFFIDAVIT
Defendant.	

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

FREDERICK H. COHN, being duly sworn, deposes and says:

I am the attorney for defendant herein and make this affidavit in support of a motion to dismiss the indictment based on prejudicial pre-indictment delay. The crime alleged was committed on January 10, 1972. Defendant was apprehended in another matter on February 14, 1972 in St. Louis, Missouri.

On information and belief, the Federal Bureau of Investigation was immediately made aware of his capture. On June 4, 1972 fingerprints found in the bank were allegedly identified by the FBI as belonging to defendant Brown. The defendant was not indicted until approximately November 1st, 1973, a hiatus of approximately 18 months. The government declines to state any reason for delaying said indictment. (See Exhibit "B" appended to

the motion for discovery) and counsel can only guess at the government's motives, but the delay itself should cause the Court to inquire from the government as to the reason.

The Court should note that defendant is an alleged member of the Black Liberation Army. The effects of that are more particularly spelled out in the motion for discovery but it is intriguing that the indictment did not lodge until after defendant was brought to New York to face trial under a New York State indictment charging him with the murder of two police officers. That trial is presently pending. It would seem therefore that the government has delayed all this time for a tactical advantage: waiting until defendant is so heavily weighed down by litigation that he can neither devote his attention to this litigation or until he has so many convictions that he is effectively estopped from participating in his own defense by presenting any affirmative defense.

Counsel draws this conclusion, at least partially, from the fact that upon information and belief all cases involving black militants, and particularly the black militants in the Eastern District of New York, are handled by Mr. Robert Clarey, the Assistant United States Attorney handling this case. It is inconceivable to me that Mr. Clarey did not choreograph this in a way to be of particular advantage to the government.

WHEREFORE, your deponent respectfully prays that the indictment herein be dismissed, together with such other and further relief as to this Court may seem just and proper.

Frederick H. Cohn

Sworn to before me this
11th day of January, 1974.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA

-against-

HENRY STUART BROWN,

Defendant.

- - - - - - - - - - - - - - - - - -

73 CR 960

Memorandum of Decision and Order

March 22, 1974

Defendant moves to dismiss the indictment ". . . on the ground that pre-indictment delay substantially prejudiced the defendant . . . ." The indictment, filed on November 1, 1973 charges the defendant with armed robbery of the Bankers Trust Company on January 10, 1972, in violation of 18 U.S.C. §§ 2113(a) and 2113(d). The supporting affidavit made by defendant's counsel does nothing more than point to the period of delay between the commission of the crime and the indictment, i.e., approximately 20 months, and calls on the Government to state the reason for delay. The affidavit points to a letter of the United States Attorney, dated January 3, 1974, responding to pre-trial discovery in which the Government declines to state the reason for delay and indicates that until June 5, 1972,

the date of the fingerprint report, the defendant was a suspect. The affidavit hints that the delay has been:

> . . . for a tactical advantage: waiting until defendant is so heavily weighed down by litigation that he can neither devote his attention to this litigation or until he has so many convictions that he is effectively estopped from participating in his own defense by presenting any affirmative defense.

The right to a speedy trial under the sixth amendment does not include a right to a "speedy indictment." A defendant's right to a speedy trial is measured from the time he is formally accused, either by arrest, complaint, information or indictment. United States v. Marion, 404 U.S. 307, 92 S.Ct. 455 (1971); United States v. Hauff, 461 F.2d 1061 (7 Cir. 1972), cert. denied, 409 U.S. 873, 93 S.Ct. 203 (1972); United States v. Capaldo, 402 F.2d 821 (2 Cir. 1968), cert. denied, 394 U.S. 989, 89 S.Ct. 1476 (1969).

In his brief defendant argues that his fifth amendment right to due process was violated because either defendant was prejudiced by the delay or the delay was intentional for the purpose of giving the Government

a tactical advantage.[1] Mr. Justice White's discussion in Marion,[2] reviewing Court of Appeals decisions which have considered pre-indictment delay as a cause for dismissal, points to those decisions as requiring "a showing of actual prejudice." Judge Lumbard, noting in Capaldo that prosecution was commenced 40 months after the crime, stated in response to a claim of a sixth amendment violation:

> . . . this court has considered the merits of such claims and has held, consistent with the views of the Supreme Court in United States v. Ewell, 383 U.S. 116, 122, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966) that the statute of limitations is the primary guarantee against the bringing of stale criminal charges . . . . [I]t is incumbent upon the accused to demonstrate that the delay has so impaired

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[1] Defendant's brief cites a number of cases, which he argues, supports an interpretation that the two-prong test in Marion is disjunctive, permitting dismissal where either of the two requirements is met, i.e., United States v. Lemons, 470 F.2d 135 (3 Cir. 1972), cert. denied, ... U.S. ___, 93 S.Ct. 2758 (1973); United States v. Booz, 451 F.2d 719 (3 Cir. 1971); United States v. Erickson, 472 F.2d 505 (9 Cir. 1973); United States v. Ferrara, 458 F.2d 868 (2 Cir.), cert. denied, 408 U.S. 931, 92 S.Ct. 2498 (1972). The court finds these cases inapposite. In these cases the defendant proved neither a Government intention to secure a tactical advantage through delay, nor actual prejudice to the defendant. In all instances, the relief was denied for pre-indictment delay.

[2] 404 U.S. at 315, 92 S.Ct. at 460-62.

his capacity to prepare a defense as to amount to an infringement of his right to a speedy trial or a denial of due process./3

The defendant's affidavit is wholly inadequate to support a claim for dismissal. The broad, general, vague and conclusory allegation that the delay was an intentional one to bring about a tactical advantage and/or that the defendant was prejudiced is insufficient. United States v. Frost, 431 F.2d 1249 (1 Cir. 1970), cert. denied, 401 U.S. 916, 91 S.Ct. 896 (1971).

The motion is in all respects denied and it is SO ORDERED.

U. S. D. J.

/3 402 F.2d at 823.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	Indictment No. 73 CR 960
-against-	
HENRY STUART BROWN,	NOTICE OF MOTION
Defendant.	

S I R:

PLEASE TAKE NOTICE, that the undersigned will move this Court at a Motion Term to be held before the Hon. Jacob Mishler, at the United States Court House for the Eastern District Of New York, 225 Cadman Plaza East, Brooklyn, New York, at 10:00 o'clock in the forenoon on January 29th, 1974, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 16 of the Federal Rules of Criminal Procedure granting certain discovery in the above entitled case, as reflected in the Demand for Discovery annexed hereto, and for such other and further relief as to this Court may seem just and proper under the circumstances.

Dated: New York, New York
January 7, 1974

Yours, etc.

FREDERICK H. COHN
Attorney for Defendant
640 Broadway
New York, New York 10012
(212) 677-1552

TO: HON. EDWARD BOYD
Acting U.S. Attorney, E.D.N.Y.
225 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	Indictment No. 73 CR 960
-against-	
HENRY STUART BROWN,	DEMAND FOR DISCOVERY
Defendant.	

The defendant, by his attorney, Frederick H. Cohn, hereby demands the following discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure:

1. Names of witnesses expected to testify at trial on behalf of the Government.

2. Copies of the criminal record of any Government witness expected to testify.

3. Statement whether the Government has any evidence of the defendant's whereabouts in the month of January, 1972 other than his alleged whereabouts on January 10, 1972.

4. Copies of any FBI reports other than the arrest record already supplied on prior involvement with the law by the defendant.

5. The name of the third perpetrator who is suspected at this time of acting with Henry Stuart Brown in the alleged occurrence of January 10, 1972.

6. Prints of the photographs referred to in FBI report of the Identification Division, Latent Fingerprint Section, File No. 91-11128 of January 24, 1972 and June 5, 1972, which numbers are 2, 9 and 14 in six submitted photographs.

Dated: New York, New York
January 7, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

73 CR 960

-against- :

AFFIDAVIT

HENRY STUART BROWN, :

Defendant. :

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

FREDERICK H. COHN, being duly sworn, deposes and says:

I am the attorney for defendant herein and make this affidavit in support of a motion for discovery. On December 11, 1972, pursuant to our agreement, I sent a letter to the United States Attorney spelling out my requirements for discovery, a copy of which is attached hereto and made a permanent part hereof as Exhibit "A".

On or about January 5, 1974 I received his answer, a copy of which is attached hereto and made a permanent part hereof as Exhibit "B".

As the Court will note, there are a number of areas where we have failed to agree and it is those areas primarily which are

the subject of this motion. The discovery in this case must be taken in the context of the nature of the defendant and the posture of the case. Mr. Brown is at this moment on trial in Supreme Court, New York County, on charges of having murdered two police officers. He is referred to in the press as a member of the Black Liberation Army. The District Attorney in the New York State case has stated his intention to prove not only Mr. Brown's membership in the Black Liberation Army but also crimes other than the one with which he is charged in New York.

Clearly then this is a case of great notoriety involving a person who is alleged to be a "revolutionary" and a person of some interest to governmental authorities of all branches of the government. Upon reading Mr. Clarey's response to me in the context of that information, one should note that it is carefully drafted so that any discovery of information held by the Federal Bureau of Investigation or any other agency as to Black Liberation Army connections and investigations of that body is withheld. This application should also be read in the light of the government's failure to indict defendant until shortly before his trial in New York commenced although he has been in the custody of governmental authorities since February 15, 1972. (See fingerprint report record attached to motion for appointment of defense fingerprint expert.)

DEMANDS NO. 1 and NO. 2

It is apparent from a careful reading of the discovery acceded to by the government as reflected in Exhibit B that the government intends to utilize an informer at trial and that that person may well have an extensive criminal record. In response to defense demand No. 10 in Exhibit "A" the government says: "Arrest records of any government witnesses who have been arrested will be provided at trial." The government clearly does not say that no people who are expected to testify at trial have criminal records. Reading that with the answer to demand No. 16 "The defendant carried a Smith and Weston .38 caliber revolver loaded with 5 cartridges, during the robbery" (emphasis supplied), it becomes more than speculation to realize that someone who alleges himself to have been on the inside is giving the government information. This theory is the only explanation for why, without any other occurrences to precipitate it, the government resubmitted defendant's fingerprints on June 5, 1972.

Informer testimony is among the most sensitive that may be presented to a jury. It is probably the subject of the most searching cross-examination in criminal trials and counsel should be afforded maximum time to seek information with which to impeach the credibility of that witness. Recent trials of black militants have demonstrated that informers quite often have psychiatric histories (United States v. Chesimard and Hilton, Southern District of New York; People v. Holder, Supreme Court, Queens County;

People v. Michael D. Hill, Supreme Court, Queens County), their criminal careers are checkered and may be the subject of searching inquiry which may go beyond the criminal record sheet given to the defense at the time of testimony, their personal lives would well lead a normal person sitting on a jury to suspect their ability to tell the truth. None of these areas can be developed by trial counsel without adequate time to investigate.

In fact, the only reason counsel for the defense can ascribe to the government's refusal to state the names of witnesses is that the government is afraid of interference with the safety or peace of mind of that witness. The government's paranoia in this area might well be dealt with by a suitable protective order, which counsel would be pleased to consent to.

The information demanded in Demands No. 1 and 2 is absolutely essential for a proper defense of this case.

DEMANDS NO. 3 and NO. 4

While counsel knows that this Court will make every effort to keep normally extrinsic matters such at the Black Liberation Army away from the jury, it is defense counsel's obligation to seek to place before the jury a rationale as to why the government has indicted Henry Stuart Brown.

Insofar as Mr. Brown was indicted a long time after he was apprehended and insofar as the government knew of his whereabouts and at least claims to have made the final positive connection between

defendant and the occurrence of January 10, 1972 on June 5, 1972, a jury is entitled to know that the government conceives of this man as an enemy on political grounds and that this may well be a motivation for this prosecution. A jury will be entitled to know and to receive fair comment upon summation from defense counsel about the effect of government agents' predisposition to believe criminal activity upon fingerprint tests and investigative techniques that were or were not used.

Again, counsel cannot wait for trial until Jencks material is turned over. In fact, this material at this time, in this case, rises to the level of exculpatory material and should be turned over for investigation and development prior to trial.

The information demanded in Demands No. 3 and 4 is absolutely essential for a proper defense of this case.

DEMAND NO. 5

The government by rather cagey language declines to state the name of the third person alleged to have been a co-actor on January 10, 1972. "The identity of the third subject in the surveillance photo is not known with certainty at this time." (Exhibit "B" Nos. 11 and 12).

That language leads one to believe that the government has at least something which rises above a mere suspicion in terms

of who this person was and insofar as that person might be able to exonerate defendant, counsel should be at least entitled to pursue him. The Court should note that it is this kind of language in fact tnat permeates the entire response as shown in Exhibit "B".

The government, in declining to state the reason for the delayed indictment, ignores the fact that on February 15, 1972, the same day as his apprehension in St. Louis, Missouri, Henry Stuart Brown was already a suspect in this case. (See government Response No. 5, Exhibit "B"). The government fails to state explicitly that there are other records on Henry Stuart Brown but merely states "We will provide only the enclosed arrest record in response to this demand." (Exhibit "B", No. 9).

In short, the government is treating this case not as a search for truth where the rights of a person who faces a substantial jail term if convicted are at stake, but instead as a game of hide and seek. Counsel respectfully submits that modern theories of criminal jurisprudence and justice will not allow this.

The information demanded in Demand No. 5 is absolutely essential for a proper defense of this case.

DEMAND NO. 6

Since there is some question as to the accuracy of the fingerprint identification which is discussed in another motion in this case, the defense should have the same photographs to work from

as the government's experts did. The work done by defendant's expert, should one be appointed pursuant to a separate motion, should be private and a defense product completely, and therefore defense should be able to supply that expert with the photographs to work on at his or her leisure.

The information demanded in Demand No. 6 is absolutely essential for a proper defense of this case.

WHEREFORE, your deponent respectfully prays that the motion and demand for discovery be granted, together with such other and further relief as to this Court may seem just and proper.

_____

Frederick H. Cohn

Sworn to before me this
11th day of January, 1974.

Lefcourt, Brennan, Cohn & Katz
attorneys at law
640 Broadway, N.Y.C. 10012
(212) 677-1552

Gerald B. Lefcourt
Charles F. Brennan
Frederick H. Cohn
Sanford M. Katz

December 11, 1973

Robert L. Clarey, Esq.
Assistant U.S. Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

Re: People v. Henry Stuart Brown
Indictment No. 73 Cr. 960

Dear Mr. Clarey:

Pursuant to our conversation on December 4, 1973, the following constitutes my demand for discovery in the above case. This letter will also reflect our agreement that because of the pressures of my office and because of the unfortunate events of the day we met to resolve some of the issues, my time to make motions will be extended for an additional two weeks pending the approval of the Court. This takes into account that the case is not scheduled for trial until February 18, 1974 and that no prejudice will accrue to the Government or defendant through this delay.

DEMAND

1. Any picture or photograph purporting to be a picture or photograph of the defendant.

2. A declaration of whether or not said picture or photograph was used in a show-up proceeding.

(a) If such picture or photograph was used in such proceeding, state the date and place of such proceeding and the name and address of the person making the identification.

(b) If there was such a show-up, state whether any other photographs or pictures were used in such show-up or whether the show-up consisted solely of the picture or photograph allegedly of the defendant. If other pictures or

EXHIBIT A

COPY

photographs were used, please supply same and describe in detail the manner in which these pictures were used and the order and format in which they were presented to the witness or witnesses.

3. Copies of all scientific reports, including but not limited to fingerprints, ballistics tests, or chemical or physical analysis of any physical evidence.

4. State the names and addresses of all witnesses who are expected to testify at trial.

5. State whether any person has negatively identified defendant or has failed to identify him in a picture show-up or line-up.

(a) If the answer to the above is yes, state the name and address of such person and the date of the show-up.

6. State whether the Government has any evidence of the defendant's whereabouts on January 10, 1972 other than the City of New York, or whether the Government has evidence of his whereabouts shortly before or after.

7. State the date on which the Government or any agency thereof became aware that the defendant was a potential defendant in a case arising out of the events alleged in the indictment herein.

8. State the reason, if any, for the delay in the indictment of the defendant in this matter.

9. Provide a copy of the FBI report on any prior involvement of the defendant with the law.

10. Provide copies of FBI reports on prior involvement with the law of any witnesses intended to be called by the Government at trial.

11. State whether the Government will allege that the defendant acted alone or in concert with others.

(a) If the Government contends that the defendant acted with others, state whether their identities are known and provide their names to defendant.

12. State whether any person has been granted or offered immunity for information in this case for his testimony.

(a) If any person has been offered a grant of immunity, state his name and address.

13. State whether there has been any electronic surveillance, including but not limited to, wiretaps or eavesdropping on Henry Brown. If so, state under what authority that interception was obtained.

14. State whether the Government intends to offer any statements or admissions made by the defendant.

15. State the time of day the occurrences alleged in the indictment took place.

16. State the type of dangerous weapon used by defendant as alleged in Count Two of the indictment.

17. Provide copies of any statement obtained from Henry Brown, through whatever means, whether or not they will be used in evidence against him.

Very truly yours,

Frederick H. Cohn

FHC:eb

COPY

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

TPP:RLC:mc
F.#733,920

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

January 3, 1974

Frederick H. Cohn, Esq.
Lefcourt, Brenman, Cohn & Katz
640 Broadway
New York, New York 10012

Re: United States v. Henry Stuart Brown
Criminal Docket No. 73 CR 960

Dear Mr. Cohn:

Set out below is our response to your discovery letter of December 11, 1973 with respect to the above-captioned case. The numbers correspond to those used by you.

RESPONSE

1. Surveillance photographs which we contend depict Mr. Brown may be viewed by you at this office by appointment at any mutually convenient time prior to trial.

2. There has been no show up proceeding but the surveillance photograph taken at Bankers Trust on January 10, 1972 was shown to a person as described in 5 below.

3. Enclosed are copies of reports concerning latent fingerprints of Mr. Brown found at the bank. No other scientific tests were conducted with respect to this defendant.

4. We decline to provide a list of witnesses expected to testify at trial.

5. On February 15, 1973 the surveillance photo

EXHIBIT B

described in 1 and 2 above was shown by an FBI Agent to one Henry Stuart Brown, 195 Van Buren Street, Brooklyn, the uncle of this defendant. Mr. Brown advised the agent that he was unable to recognize any of the individuals in the photograph.

6. As to this defendant's whereabouts in January we decline to make any representation except that he was at the Bankers Trust, 869 DeKalb Avenue, Brooklyn on the morning of January 10, 1972.

7. The Government was not aware with any certainty that defendant was involved in the robbery in question until June 5, 1972 the date of the enclosed fingerprint report. Prior to that time he was merely a suspect.

8. We decline at this time to put forth any reasons for any alleged delay in filing an indictment.

9. We will provide only the enclosed arrest record in response to this demand.

10. Arrest records of any government witnesses who have been arrested will be provided at trial.

11. & 12. It will be contended that this defendant acted in concert with at least two other individuals in perpetrating the robbery in question. It is believed that one of these individuals was one Woodie Green now deceased. The identity of the third subject in the surveillance photo is not known with certainty at this time.

13. No electronic surveillance has been employed as to this defendant by any federal authority. Additionally local authorities in New York were contacted and they advised that this defendant has not been the subject of any electronic surveillance by any state jurisdiction.

14. On April 3, 1973 at the Missouri State Penitentiary when the defendant was shown the surveillance photo discussed above by an FBI Agent he became very nervous and agitated and said "I better get out of here". The government may offer testimony as to this incident. Otherwise no statements or admissions were made by the defendant.

15. The bank robbery in question took place at approximately 9:00 A.M. or very shortly thereafter, on January 10, 1972.

16. The defendant carried a Smith and Weston .38 caliber revolver loaded with 5 cartridges, during the robbery.

17. See 14 above.

Very truly yours,

EDWARD JOHN BOYD V
Acting United States Attorney

By: R. L. Clarey
Robert L. Clarey
Assistant U.S. Attorney

Encls.

and raise your right hand.

W I L B U R R O L A N D , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Be seated.

DIRECT EXAMINATION

BY MR. CLAREY:

Q How old are you, Mr. Roland?

A Thirty.

Q What city do you live in?

A Brooklyn.

Q What part of Brooklyn?

A Flatbush.

Q Do you know the defendant Henry Stuart Brown?

A Yes.

Q Do you see him in the courtroom and would you point to him.

A That's him over there.

Q Will you describe what he is wearing generally.

A Black sweatshirt.

THE COURT: Let the record show the witness pointed out the defendant Henry Stuart Brown.

Q How long have you known Henry Stuart Brown?

A About 15 years.

Q Mr. Roland, have you ever been arrested.

A Yes.

Q Approximately how many times?

A Four.

Q Was the first of those arrests in 1961?

A Yes.

Q What was that for, sir?

A Assault.

Q And how did it arise, very generally?

A A fight.

Q A fight with another person?

A Yes.

Q Was the second of those arrests in 1968?

A Yes.

Q And was that for a series of robberies?

A Yes.

Q For how many robberies were you arrested at that point, sir?

A It was all consolidated. I was arrested twice actually.

Q And it was for the same series of robberies; am I correct, sir?

A Yes.

Q Did you serve time in prison as a result of that arrest?

A Yes.

Q How much time?

A I served three and a half years.

Q Where?

A Green Haven Prison.

Q Were you again arrested in 1973?

MR. COHN: Objection, Your Honor. He should merely ask him when he was arrested, rather than givin him dates.

THE COURT: Well, were you convicted of a felon Go ahead, Mr. Clarey.

Q Were you arrested for a felony?

A Yes.

Q When was that?

A February 19th.

Q What year?

A '73.

MR. COHN: I'm sorry, I didn't get it.

THE WITNESS: '73.

MR. COHN: I'm sorry, I didn't hear the last answer.

THE WITNESS: February, 1973.

Q And what was that for, sir?

A Robbery.

Q Was that in Kings County?

A Yes.

Q On that robbery has the Kings County District Attorney promised not to prosecute you, sir?

A Yes.

Q Is that in return for your testimony here in this courtroom?

A Yes.

Q Have they also promised not to prosecute a Diane Richardson?

A Yes.

Q Was that at your request, sir?

A Yes.

Q And have you also been promised that you will not be prosecuted for this bank robbery upon which you are testifying now?

A Yes.

(Continued next page)

Q Mr. Roland, directing your attention to the 12th of December, 1971, did you have occasion to go to Lindy's Bar at Myrtle and Kent in Brooklyn?

A Yes.

Q What time of day did you go there?

A It was at night, about 1:30, 2:00 o'clock.

Q Did you go there with someone else?

A Yes.

Q With whom?

A Henry Brown and Woody Green.

Q By Henry Brown, are you referring to this defendant?

A Yes.

Q Very generally, what occurred, if anything, in that bar on that evening?

A We went in and had --

THE COURT: I am going to sustain it as to form. If you believe this witness' testimony, it is submitted to you only for the purpose of determining whether the Government has sustained its claim or position that the defendant Henry Brown had possession of the gun that was used in the robbery in this charge. We are not interested in the events of December 12, 1971 for any other reason.

You may use leading questions.

Q Was a gun taken by anyone that night in that bar?

A Yes.

Q By whom was it taken?

A Woody Green.

Q From whom was it taken?

A A police officer.

Q What happened to that gun if you know that night?

A We took it to Woody Green's house and me and Brown had a little squabble over who was supposed to get the gun and he got it first so that left me out.

Q So Henry Brown got the gun that evening?

A Yes.

THE COURT: Did you see him take the gun?

THE WITNESS: Yes, Woody Green took the gun.

THE COURT: I am talking about Mr. Brown.

THE WITNESS: He took the gun in the house.

THE COURT: You saw him do that?

THE WITNESS: Yes.

Q Now, Mr. Roland, directing your attention to January 5 of 1972, were you in an apartment on Montgomery St. in Brooklyn?

A Yes.

Q What time of day were you in that apartment?

A It was at night.

Q Was anyone else present with you in that apartment?

A Yes.

Q Who?

A Henry Brown, Woody Green, Melvin Carney and Tom McQuary.

Q Whose apartment was it?

A I believe it belonged to a girl.

Q Were there girls present also?

A Yes.

Q Was there a conversation on that evening in that apartment?

A Yes.

Q Do you recall who said what?

A Brown said he was walking on Sumner and DeKalb and went in a bank and there was only one camera in there. And we should try to stick it up.

Q Did he say when he had been in that bank?

A That day.

Q Did anyone else say anything after Henry Brown said that?

A We said --

THE COURT: When you say we, can you identify the individual?

THE WITNESS: Woody Green and myself.

MR. COHN: I object to what anybody else said.

THE COURT: Overruled. This was in the presence of Mr. Brown?

THE WITNESS: Yes.

THE COURT: All right, you may tell us what you said or what Woody Green said.

THE WITNESS: We said we should go look the bank over first.

Q You and Woody Green said that?

A Yes.

Q Was there any further conversation concerning this bank on that evening?

A No. I don't think so. I don't remember no other.

Q On the following morning, January 6th, did you go anywhere?

A Yes.

Q Where?

A To the bank.

Q Where did you start out from to go to the bank?

A We started out from Woody Green's house.

Q Approximately what time, do you recall?

A It was 9:30, 10:00 o'clock.

Q How did you get to the bank?

A A fellow drove us.

Q Do you know who that was?

A I am not sure of his name now. I think his name was Jackson.

Q Had he been in the apartment the night before?

A No.

Q Who went to see the bank on the morning of January 6th?

A Me, Brown, Woody Green, and this other fellow.

Q Whose car did you go in?

A His car. This guy Jackson.

Q What did you do when you got to the bank?

A We sat outside for five, ten, fifteen minutes. Just looking.

Q Did you ever go in the bank on that morning?

A No.

Q Was there any conversation while you were in the car outside the bank?

A It looked easy like he said.

Q Who said that?

A Brown said it.

Q Did you or any of the others say anything?

A Brown was right in what he said, you know, you couldn't see in the bank. The windows are up. You couldn't look in.

MR. CLAREY: Can you mark these two photographs for identification, please?

THE CLERK: Two photographs marked Government's Exhibit 29 and 30 for identification.

Q I will show 29 and 30 for identification to the witness.

Do you know what is shown in either of or both of those photographs, Mr. Roland?

A The bank that we robbed.

Q Is it also the bank that you went to look at on January 6th?

A Yes.

MR. CLAREY: I will offer those into evidence at this time.

THE COURT: Show it to Mr. Cohn.

Q Do they show the outside of the bank?

A Yes.

Q Is that correct?

A Yes.

(Pause)

MR. COHN: No objection.

THE COURT: Let them be marked.

THE CLERK: Government's Exhibits 29 and 30, previously marked for identification now marked in evidence.

(So marked.)

Q When you left the bank, did you or anybody else with you go somewhere?

A (No response.)

Q On the morning of January 6th.

A That's when we were looking at the bank?

Q Yes.

A We went back to Woody Green's house.

Q Did all of you go back?

A Yes.

Q Was there any conversation after you got back to Woody Green's house?

A We were determining when we were going to rob the bank.

Q Who said what, if you can remember?

THE COURT: Again, tell the jury who was present at the time.

THE WITNESS: Brown, Woody Green, myself, and the other guy, the driver.

Q Was Melvin Carney present at that time?

A Yes.

Q The other guy whose name is Jackson, you believe?

A Yes.

Q Do you remember who said what back at Green's apartment?

A I don't recall exactly. It's been a long time. I believe it was like a discussion -- I don't remember who said exactly what.

Q Can you tell us what was said?

MR. COHN: Objection. As long as he doesn't state --

THE COURT: Overruled. I will allow it.

A We were discussing when we should rob the bank.

Q Was there any conclusion?

A Yes, we were going to do it the following week.

Q The following week, the week would have been done on Monday, January 10th?

A Right.

Q Is that right?

A Yes.

Q Directing your attention to the night of

January 9, Sunday, 1972, where did you go on that night?

A To a house on Montgomery and Utica.

Q Is that the same apartment you described earlier?

A No, it is not Woody Green's house, it is a different one.

Q Is it the apartment you met on the night of January 5th?

A (No response.)

Q McQuery's?

A Yes.

Q Who was present on that night in that apartment on January 9, Sunday night?

A Brown, Woody Green, myself, and some girls.

Q Was Melvin Carney present on that night?

A No.

Q Was there a conversation among you, Brown, and Green on that night?

A Yes.

Q Can you tell us who said what?

A Woody Green said the guy that was supposed to drive for us, he couldn't get in contact with him or he didn't show up.

Q Is this referring to the person Jackson?

A Yes.

Q Go ahead. Was anything else said?

A Brown said we needed a car. So me and Woody Green were elected to go out and get one.

Q Did you then leave the apartment?

A Yes.

Q Where did you go?

A We walked towards Church Avenue.

Q What did you do while you were walking, if anything?

A Looking for a place to take a car.

Q To steal a car?

A Yes.

Q Did you find one in that vicinity?

A Not exactly in that vicinity.

Q Did you continue to walk?

A Yes.

Q To where?

A Church Avenue.

Q What did you do when you got to Church Avenue?

A We took the bus.

Q Which bus?

A Church Avenue bus.

Q To where?

A I don't know the exact street but it is past Bedford Avenue towards Hertz Rent-A-Car.

Q Are you sure it was Hertz?

A I am not positive but I am pretty sure it was Hertz or Kinney's.

Q What, if anything, did you do at Hertz or Kinney's Rent-A-Car on Church Avenue?

A We went inside and pulled guns and made the guy give us the keys to a car.

Q You both had guns?

A Yes.

Q Where had you gotten your gun?

A From Thomas McQuery's house.

Q Who gave it to you?

A Thomas McQuery.

Q Do you recall what kind of a gun it was?

A A long .38.

Q When had you gotten it?

A That night.

Q Had Thomas McQuery participated with you in planning this bankrobbery?

A No.

Q Do you know why?

MR. COHN: Objection.

THE COURT: Sustained.

Q What happened after you pulled the gun at Church Avenue at the rental car place?

A We asked the guy for keys to a Cadillac and he said it was all jammed up in there.

Q Who did you ask?

A The attendant.

Q What was his response?

A He said with the Cadillac it was way in the back. It would be too hard to pull it out. He said, "Here is keys to a car across the street." And he showed us where the key was and we took that.

Q Do you know what kind of a car it was?

A No. Like a little foreign sports car.

Q Was it large or small?

A Small.

Q Did you go anywhere in that car?

A Yes, I drove it to Kosciusko and Sumner.

Q Kosciusko?

A And Sumner.

Q Where is that?

A Kosciusko.

Q Anywhere near DeKalb and Sumner?

A Yes, around the corner.

Q What did you do when you got there?

A Parked it and left it there.

Q What time of day was it?

A At night.

Q Approximately what time?

A About 12:00 o'clock.

Q Midnight?

A Yes.

Q Was Green with you when you parked the car?

A Yes.

Q Was anyone else with you?

A No.

Q What did you do after you parked the car?

A We went back to Bainbridge -- not Bainbridge, Montgomery and Utica.

Q How did you get back there?

A By the bus.

Q What happened -- was anyone there when you got back?

A Yes.

Q Who was there?

A Henry Brown, Thomas McQuary and the girls.

Q Was there a conversation when you got back?

A About we had took the car and we supposed to

meet the next morning early.

Q Who was --

A Henry Brown, Melvin Carney and Woody Green.

Q Was Melvin Carney at the apartment when you got back that night?

A No.

Q Do you know how he knew he was supposed to meet --

MR. COHN: Objection.

THE COURT: Objection sustained.

Q Did you talk to Melvin Carney on that night?

A No.

Q Do you know if anyone else spoke to him on that night?

MR. COHN: Objection.

MR. CLAREY: If he knows.

THE COURT: Objection sustained.

Q Where were you supposed to meet the following morning?

A Woody Green's house.

Q Where is that located?

A Bainbridge and Reade.

Q Did you go there the following morning?

A Yes.

Q Is this the morning of January 10, 1972?

A Yes.

Q Is that correct?

A Yes.

Q What time did you arrive there, do you recall?

A About 8:15, 8:30.

Q Was anyone there when you got there?

A I think I got there first. Brown got there second and Melvin Carney got there third.

Q Was anyone there when you got there?

A Woody Green.

Q He lived there, is that correct?

A Yes.

Q Did there come a time -- was there any conversation on that morning after you all arrived there?

A We planned how we were going to do it.

Q Do you recall who said what?

A Woody Green said he would take care of the guard, Melvin Carney said he would stay in the middle of the bank, and Henry Brown said he would jump the counter.

Q Did you leave Green's apartment that morning?

A Yes.

Q About what time, do you know?

A Something to nine.

Q What?

A A quarter to nine.

Q What did you do when you left?

A Took the bus.

Q Who took the bus?

A The three of us.

Q Was anything done by any of you before you took the bus?

A We brought a shopping bag.

Q Who did?

A I believe it was Woody Green.

Q Do you know where?

A One of the stores around there.

(continued next page)

Q Where did you take the bus to?

A To DeKalb and Reed.

Q Then what did you do?

A Transferred and took the DeKalb bus.

Q Where did you take that bus to?

A To Sumner and De Kalb.

Q What did you do -- all of you do, when you got to Sumner and De Kalb?

A We all got off and they waited across the street from the bank.

Q Who did?

A Henry Brown, Melvin Carney and Woody Green.

Q By across the street, I will show you Government's Exhibit 30.

Does it appear on that photograph where those three waited?

A No.

Q Where would it be in relation to thephotograph?

A Over here (indicating).

THE COURT: Will you put an arrow in the direction you say they waited and use that crayon. Just a heavy arrow to show the direction.

Q What did you do as they waited on the corner?

A I went and got the car.

Q Then what?

A I drove back around on the side where they were waiting. When they saw me coming, they walked across the street to the bank.

Q Did you go -- did you see them go into the bank?

A Yes.

Q What did you do after you saw them?

A I pulled across the street in front of the bank.

Q Does it appear on this photograph where you pulled the car?

A Yes.

Q Would you write on that photograph "car" please?

A Yes.

Q Is this where you parked the car?

A Yes, right here (indicating).

Q Right outside the door to the bank?

A Yes, right next to the box, the mailbox.

Q Is that on Sumner?

A Yes.

Q How long did you wait there?

A About four to five minutes, six minutes.

Q What happened after four or five minutes?

A Brown, Woody, Green, Melvin Carney, came out of the bank.

Q What did you do?

A I pulled off.

Q Did they get into the car?

A Yes.

Q Do you recall who came out of the bank first, and who came last?

A Melvin Carney came out first, Brown second, and Woody Green last.

Q Was there any conversation after they got into the car?

A Brown said he left the gun.

Q Do you remember exactly what he said?

A He said "I blanked out and left thegun."

Q Where did you drive to with all four of you in the car?

A To Bainbridge Street.

Q Was anyone carrying anything when the three got into the car?

A The shopping bag.

Q Did you have a gun on that day?

A Yes.

Q Was it the same gun you had had?

A Yes.

Q On the night before?

A Yes.

Q Do you know whether the other two, Carney and Green, had a gun?

A Yes, they had.

Q They each had guns?

A Yes.

Q Had you seen those guns?

A Yes.

Q When?

A I seen them before we left.

Q Did you see them after the robbery?

A Yes.

Q Now, where did you say you drove to?

A Bainbridge and Reed.

Q Did someone live there?

A Yes, Woody Green.

Q You went back to Woody Green's apartment?

A Yes.

Q What happened at Woody Green's apartment when you arrived there in the car?

A First, I let them out. Then I parked the car about two blocks up. Then I left it.

Q On what street?

A On Bainbridge Street. I don't know if it is

Padgett Street or something.

Q What did you do then?

A I walked down to Woody Green's house.

Q Was anyone there when you arrived?

A Yes, Henry Brown, Woody Green, MElvin Carney and the girl, his wife, I guess.

Q What occurred when you got there?

A They had dumped all the money on the bed.

Q Then what?

A Started to count it.

Q Did you assist in counting it?

A Yes.

Q Do you remember -- well, what happened after the money was counted?

A We turned the radio on to see if any -- you know --they broadcasted it over the radio.

Q What?

A The bank robbery.

Q Did you complete counting the money then?

A Yes.

Q What happened with the money?

A We divided it up and that was it.

Q How much -- how many ways was it divided?

A Four ways all together.

Q Do you remember how much you got?

A About thirty seven hundred and some change, I guess. Thirty seven hundred.

Q Thirty seven hundred and change?

A Yes.

Q What did you do with your share of the money?

A I bought narcotics with it.

Q You bought heroin with it?

A Yes.

Q What did you do with the heroin?

A Sold it.

Q Have you before -- have you since, sold heroin?

A No.

Q Have you used any drugs?

A I snorted drugs before.

Q When?

A Since around '68.

Q Did you use any drugs in '71?

A '71?

Q Yes.

A Maybe off and on, you know.

Q Did you use cocaine?

A Yes.

Q Frequently?

A Not frequently.

Q I will show you Government's Exhibit 4B, C and D in evidence.

Do you recognize any one shown in those photographs?

A Yes.

Q Who?

A I recognize Henry Brown.

Q Which one is he?

A The one with the shopping bag.

Q Is there a number on that shopping bag?

A Yes.

Q What number?

A ONe.

Q Do you recogNize anyone else?

A By the clothes they got on.

Q Can you --

A Yes.

Q Who else?

A Melvin Carney and Woody Green.

Q Is there a number near Melvin Carney?

A Number two.

Q What is he wearing in the picture?

A Like a raincoat and a ski mask.

Q Where do you see Woody Green in the picture?

A Standing next to the cage.

THE COURT: Will you mark 3 on the man you identified as Woody Green. Press on it heavily.

How about the other Exhibits? You have marked it on 4B. Do you recognize Woody Green on here and here?

THE WITNESS: Yes.

Q What is Henry Brown wearing in that picture?

A A long black coat, black turtle neck and ski mask.

Q Where is the ski mask?

A On his head.

Q Is it rolled up?

A Yes.

Q Do you recall that that is what all three were wearing on the day of the --

A Two were wearing. Woody Green had a ski mask under his hat.

Q Do you recall that that was what they werewearing on the day of the robbery, looking at this picture?

A Yes.

MR. CLAREY: No further questions.

THE COURT: Would you like a recess at this point?

MR. COHN: I have been given a massive --

THE COURT: Would you like a recess?

MR. COHN: Yes.

THE COURT: The jury may be excused.

As soon as counsel is ready, I will advise you. You may step down.

(The jury left the courtroom).

THE COURT: Please advise the Clerk when you are ready.

MR. COHN: Besides the stuff I have been given, which I assume is all the United States Attorney has, I would in the face of the importance of this witness, ask to do a little independent work on it.

THE COURT: Go over all the statements that you have and when you are through reading it, you tell me why you need extra time.

MR. COHN: I will tell you now.

THE COURT: Go ahead.

MR. COHN: It is my experience with people in this situation, quite often, that they are currently on public assistance. I don't want to ask that while he is on the stand, because it has no relation to the case.

THE COURT: You are right.

MR. COHN: I also find quite often, when on public assistance, they have received psychiatric examinations, and I would like the opportunity to find

out if that is true, and if there is a report in his Welfare report.

THE COURT: Bring Mr. Roland back, and we will ask him that question. That will take care of many hours of investigation.

MR. CLAREY: I asked Mr. Roland and his attorney Mr. Goldberg whether there was any psychiatric examination any place including in prison. Mr. Roland said that, no, he never had a psychiatric problem and doesn't recall ever being examined by a psychiatrist.

THE COURT: You get through with that and before the jury comes in we will put the witness on the stand and we can ask him those questions.

MR. COHN: I must say to take a witness of the importance of Mr. Roland and for reasons which the Court enunciated earlier shield from me --

THE COURT: I don't agree with the statements you are making and Mr. Clarey is not in the courtroom.

MR. COHN: I didn't realize he left.

THE COURT: I know. This is not the first criminal trial I have had. This is not the first accomplice testimony. And I can't understand why at this point -- now Mr. Clarey is back -- you feel I should suspend the trial to give you the opportunity for a full investigation of Mr. Roland.

MR. COHN: I am asking for overnight.

THE COURT: There is no reason. It is almost twenty minutes to four. You can ask Mr. Roland the question.

I don't want any conversation between the defendant and the witness.

Please take the stand. Go ahead Mr. Cohn.

EXAMINATION

BY MR. COHN:

Q Mr. Roland, you are presently on the street, right?

A Yes.

Q You are on public assistance?

A No.

Q You are working?

A No.

Q When you were in Green Haven, were you ever examined by a psychiatrist for the purpose of probation?

A If he was a psychiatrist, I didn't know he was.

Q Was he a psychologist?

A I don't know what he was.

Q Was he a psychiatric social worker? You don't know?

A I don't remember whether it was a social worker

-- I believe they did something like that before you leave but I forget, it's been so long ago.

Q But you may?

A May have been, I don't know.

MR. COHN: That's all, Your Honor.

THE COURT: Is that it?

Any extension or adjournment of this trial for this reason is denied.

You may step down. When you are through with the reports you may tell me.

(A recess was taken at this time.)

(Continued on next page.)

Brown
3pm1 fl/nc

CROSS EXAMINATION

BY MR. COHN:

THE COURT: Are you ready to proceed?

MR. COHN: Your Honor, I have one matter before Mr. Roland is brought in.

They can close the door so he's outside.

THE COURT: You can whisper to me.

MR. COHN: No, your Honor.

THE COURT: The door is closed.

He's about 60 feet from here,

MR. COHN: When I started this case, I have been banned from mentioning the Black Liberation Army and I have not.

THE COURT: That's right.

MR. COHN: It appears on a transcript of the interview that Mr. Clarey gave me as 3500 material on page 2 thereof, that what the prosecutor in that case wanted, Mr. Freundlich, I guess it is, David Freundlich of Mr. Gold's office, was all information about Black Liberation Army members.

They made, your Honor, quite a deal, giving him -- not only him immunity but his girl friend, immunity -- I assume it's his girl friend. And I think I should be allowed to inquire as to the depth

of their need and why they wanted BLA people.

THE COURT: Yes,

MR. COHN: Now, that poses a problem, your Honor, because in keeping with your Honor's ruling I didn't voir dire the jury about that at all.

THE COURT: No, it doesn't pose a problem at all. I think you have to read pretty far to bring it in.

Now, I am denying you the request and you have it on the record.

You can ask him if you wish out of the hearing of the jury whether he has any particular antagonisms and whteher there was a falling out as members of the so-called Black Liberation Army.

I will allow questions like it outside the hearing of the jury.

MR. COHN: Your Honor, perhpas I am not making my point clear,

THE COURT: Oh, you do, I know just what you -- I know just the point you are trying to make.

MR. COHN: Your Honor, to make a deal like this where a whole host of prosecutions are dropped not only for yourself but for your friends is highly unusual.

THE COURT: I am sure.

MR. COHN: Now, one of the reasons they wanted it was because this was the Black Liberation Army they were after and it would seem to me that it is a strong motivation to lie where the prosecution or various prosecutors want people badly foa host -- for these reasons.

THE COURT: Don't you want to ask him those questions outside the hearing of the jury?

MR. COHEN: Well, --

THE COURT: He'll tell you how much it meant and then we will have it on the record as to what effect it had.

MR. COHN: It's perfectly apparent how much it meant, your Honor.

THE COURT: No, it does not. I don't think it meant a tinker's damn.

I think the only purpose of trying to bring it in is to create either sympathy or prejudice, I am talking about, and no other reason.

MR. COHN: Your Honor, I stronly except and I except to the fact that what you are saying is about me. I am trying to get at truth and I am trying to bring a time-honored technique --

THE COURT: Mr. Cohn, if you want the truth call

4 the witness outside of the hearing of the jury, and you may get the truth.

MR. COHN: Well --

THE COURT: And that's without influencing the jury, you see.

MR. COHN: Your Honor --

THE COURT: You are reluctant to do that?

MR. COHN: No, I am not reluctant to do that.

THE COURT: Then bring them in. Bring him in. Whether you want it or not, I will ask him the questions.

Bring him in.

The mere fact that Mr. Gold felt it important to spend a lot of time about the Black Liberation Army is no reason to believe it was important to Mr. Gold.

It's no secret that District Attorneys at times like to get into the newspapers as much as defendants do.

All right, go ahead, Mr. Cohn.

Ask all the questions you want.

CROSS -EXAMINATION

BY MR. COHN:

Q Mr. Roland, this interview you had with Mr. Freundlich on March 26, 1973, do you recall it?

A (Witness nods.)

Q Is it fair to say that Mr. Freundlich wanted information about crimes committed by members of the Black Liberation Army?

A Yes.

Q And did he seem anxious to get at that information?

A He wanted information.

I don't know if he was anxious or not.

Q Now, was this the first meeting you had with police authorities as to your knowledge of activities of members of the Black Liberation Army?

A I don't understand. What --

Q Sorry.

Had you ever told any police officers before that you knew about the activities of the Black liberation Army and if they wanted information bad enough to give you some help, you will be glad to give it to them -- before that date, February 26th, I guess it was?

A No.

Q March 26th, I am sorry.

You had not?

Had you told that to your attorney?

A No.

Q Well, how was it, sir, that you wound up in the office or with Mr. Freundlich in the Supreme Court Building on the 26th?

He didn't summon you right out of the blue, he knew that you knew something about the BLA, right?

THE COURT: Now, is this a question or you are telling him?

Q Do you know how Mr. Freundlich found out that you knew something or claimed to know something about the Black Liberation Army?

A Someone gave me up.

Q Someone gave you up?

THE COURT: Do you have any antagonisms or hate for Mr. Brown because of anything that happened within the Black Liberation Army?

THE WITNESS: No.

THE COURT: Did you tell him that Mr. Brown was a member of the Black Liberation Army?

THE WITNESS: No.

BY MR. COHN:

Q Mr. Roland, did --

THE COURT: I think we have had enough, Mr. Cohn. Cross-examination.

Seat the jury.

(Jury in.)

THE COURT: You may proceed, Mr. cohn.

CROSS-EXAMINATION

BY MR. COHN:

Q Mr. Roland, on February -- on March 26, 1973 you met with Assistant District Attorney David Freundlich in the Supreme Courthouse in Brooklyn; is that right?

A Yes.

Q And at that time, sir, did he, without going into what information was -- he was requesting specifically, did he offer you immunity from prosecution for the charge that was then facing you in regard for certain information?

A Yes.

THE COURT: Now, you are to try to answer these questions yes or no, if they call for yes or no.

If you can't answer them yes or no, say you can't answer them yes or no. All right?= But don't volunteer any information.

All right.

MR. COHN: I object, your Honor.

THE COURT: Don't these questions call for yes or no?

MR. COHN: They do, your Honor, and I have been most careful about them and I am sure your Honor

recognizes that.

THE COURT: I don't say you aren't most careful about them.

MR. COHN: I object to that abjuration in front of the jury, respectfully.

THE COURT: Well, I have given that instruction to witnesses in many, many, many, many cases because witnesses are inclined to answer more than the question calls for and I am particularly careful about cross-examination because the cross-examiner is entitled to control the examination.

Otherwise we'd have pure chaos if every witness were permitted to answer the questions the way he felct.

And I gave it for that reaso and no other.

Now, continue, Mr. Cohn.

MR. COHN: Thank you.

BY MR. COHN:

Q Now, at the time you had this conversation with Mr. Freundlich, what charges were facing you?

A Robbery.

Q Armed robbery?

A Yes.

Q What kind of weapon was used?

9 Roland - cross

A What do you mean, the calibre?

Q No. A gun, right?

A Yes, a gun.

Q And what was this a robbery of?

A A social club.

Q And was anybody charged with you as an accomplice in that robbery?

A Yes.

Q Who was that?

A Three or four people.

Q Do you remember their names?

A Yes.

Q Would you give me their names.

A Philip Gonzalez, William Betts, Diane Richardson and myself.

Q Now, the other three had all been arrested; is that right?

A Yes.

Q What relationship, if any, does DianeRichardson have with you?

A She is my girl friend.

Q And how long has she been your girlfriend?

A Ten years.

Q And do you know, without telling us, do you know

how long you were facing on this armed robbery in terms of jail?

A How long I was facing?

Q Yes, yes or no, do you know?

A Yes.

Q Did it frighten you?

A No.

Q You weren't afraid of it?

A No.

Q You did three and a half years in Green Haven?

A Yes.

Q Did you enjoy it?

A No.

Q Did you think that as -- withdraw that.

But you weren't frightened by the prospect of perhaps an extended term in jail for this armed robbery?

A No.

Q Well, did it make you uncomfortable?

A Yes, it made me uncomfortable.

Q You would have preferred not to do the time if you could get away with it, right?

A What do you mean I would prefer not to do the time?

Q In other words, sir, given your choice, you would rather not do time than do time?

A Yes.

Q Now, Mr. Freundlich let it be known to you that he wanted information, right?

A Yes.

Q And he indicated to you that he wanted it badly enough so that he would give you --

MR. CLAREY: Objection.

MR. COHN: May I finish my question?

THE COURT: I will allow it. Go ahead.

Q That he wanted it badly enough sothat he would give you-- not only you but your girlfriend -- total immunity from the armed robbery charge that faced you; is that right?

A Yes.

Q And you snapped that up, right?

A No, not right away.

Q Not right away.

You hesitated?

A Yes.

Q Well, did you have more than one meeting with Mr. Freundlich?

A YEs.

Q You did? Was there a meeting before March 26th of 1973?

A No, I don't think so.

Q There were meetings after this?

A Yes.

Q Well, how long, sir, did you hesitate before you started to give Mr. Freundlich this information?

A A week.

Q A week?

THE COURT: Now, you used March 1973. Was that the correct year?

MR. COHN: That is the date on this 3500 material I have been given.

THE COURT: All right, I just wanted to make sure. I don't have a copy.

Q Well, what did you say to Mr. Freundlich when he first broached this to you? Did you say, "Well, I need some time to think it over," something like that.

A I didn't want to help him.

Q You didn't want to help him, you said, "I don't want to have nothing to do with that," right?

A Right.

Q Well, I show you, sir, what purports to be a transcript of the conversations you had with Mr. Freundlich

and some police officers on March 26, 1973.

MR. COHN: Do you have the official copy of that, Mr. Clarey?

MR. CLAREY: I have a document that's marked in evidence. I don't have the official copy.

MR. COHN: It's marked for identification.

MR. CLAREY: It's marked --

THE COURT: I don't want any colloquy before the jury.

If you want --

MR. COHN: Sorry.

THE COURT: -- to discuss anything with Mr. Clarey, over in that corner, please.

MR. COHN: Rather than give Mr. Roland my copy, your Honor, I would like to have him have an official copy. Mine is marked up.

THE COURT: Do you have an extra copy?

MR. CLAREY: I have the one that's marked, your Honor.

MR. COHN: May I have the other one?

THE COURT: You are at liberty to stand next to Mr. Roland.

MR. COHN: You can stand next to him.

THE COURT: -- if you wish to see whether it's

read right.

BY MR. COHN:

Q Now, Mr. Roland, without reading it aloud, do you agree with me that this purports to be a transcript or says at the top, of March 26, 1973?

A Hm.

Q Yes?

A Yes.

Q Okay.

Now, will you look through the first five pages or so, or as far as you wish and see where it says you are not going to cooperate, where it says you said you aren't going to cooperate.

MR. CLAREY: I will object to the question. That wasn't the testimony.

THE COURT: Strike out and disregard Mr. Clarey's remarks.

MR. CLAREY: I will object to the question, your Honor.

THE COURT: Do you see anyplace in that question an answer --

THE WITNESS: I don't --

THE COURT: -- that you didn't want to cooperate?

THE WITNESS: No.

THE COURT: Does it say that?

All right, the witness says it isn't there.

MR. COHN: Fine.

BY MR. COHN:

Q Do you say, sir, that you told Mr. Freundlich that you did not wish to cooperate to start with?

A Yes.

Q And then you say that you took about a week --

A Yes.

Q -- to make up your mind?

A Yes.

Q Did you communicate with Mr. Freundlich or through your attorney or did Mr. Freundlich through a police officer get in touch with you --

A No, an attorney.

Q Your attorney, you communicated with your attorney and as far as you know your attorney got in touch with Mr. Freundlich?

A Right.

Q By the way, sir, at the time in March of 1973, were you still on probation from your prior matter?

A Yes, I believe so.

Q And were you ever violated on probation for any of the events that led up to your incarceration on that

date?

A No.

Q You were in jail awaiting trial, weren't you --

A Yes.

Q -- while this was going on in March 26th?

A Yes.

Q You were held on bail -- or in lieu of bail?

A Yes.

Q So on March 26th or some date, you told Mr. Freundlich essentially what you have told Mr. Clarey today?

A I didn't hear you.

Q Essentially what you have told Mr. Clarey today, at least about these events that we are concerned with here; is that right?

A I didn't understand.

You will have to say that again.

Q I will withdraw the question.

Now, first of all, sir, this bar robbery on December 12th, 1971, why did you go along on that bar robbery?

A Because I needed money.

Q And what did you need money for?

A Christmas was coming.

Q Christmas was coming up?

A Yes.

Q And you needed money for Christmas presents for your family?

A Yes.

Q Well, why did you go on this bank robbery some month later, 28 days later, 29 days later?

A Because it seemed easy.

Q It seemed easy.

But did you have any purpose?

A Nothing but the money.

Q Well, what did you want to do with the money?

A I didn't have any idea at the time.

MR. COHN: If the Court will bear with me for a moment, your Honor.

(Pause.)

BY MR. COHN:

Q Did you tell Mr. Freundlich, sir, that the reason you went on these two jobs, or whatever they were, was because you wanted to get money to start up in business?

A No.

Q You didn't tell him that?

A No.

Q Well, did Mr. Freundlich execute the following

questions and did you give the following answers: Page 33:

"Question: Did Debbie Green go down on anything with you?

"Answer: You see I actually did the bar and bank with them, you know.

"Detective Herman: That was just to get you started in business?

"Answer; Yes."

Do you deny that that's what was asked and that's what you said?

A I didn't say yes to get started in business. I told them that after I stuck the bank up that I went into business selling dope.

Now, that -- that might be wrong, I don't know how it got there but --

Q So then you deny that these were the questions that was asked and that these were the responses you made, sir?

A I don't deny that it was asked but I don't think my answer was yes, that I went in the bank to startin business.

Q Then you deny that that was your answer, is that a better statement, sir?

A Yes, I would say that.

Q Now, shortly after this bank robbery out of which you said you got some $3700 --

A Yes.

Q -- your share?

A Yes.

Q Or do you say 3000?

A Said $3700.

Q 3700.

You did go into business, you bought heroin, right?

A Yes.

Q And you sold it in the street?

A Yes.

Q To whom?

A Junkies.

Q To junkies?

A Yes.

Q Any junky you could find?

A Any junky.

Q Kids?

A No.

Q No, you wouldn't sell to kids?

A No, I didn't sell it myself.

Q Oh, you didn't sell it yourself.

Q Well, did you tell your dealers--

A No.

Q -- not to sell it to kids?

A I didn't tell them anything.

Q You just said go out and get me some money?

A No.

Q You are not an addict yourself, are you?

A No.

Q Never have been?

A No.

Q Never used heroin?

A Yes.

Q You have used heroin?

A Yes.

Q Well, didn't you tell Mr. Clarey before that you never used heroin?

A I said I used coke. That's the same as heroin.

Q Cocaine is the same as heroin?

A As far as I'm concerned.

Q As far as you are concerned. I understand. Well, how often have you used heroin?

A Not very --

Q If you can distinguish between that and cocaine?

A Well, I used -- I snort cocaine.

Q You snort cocaine. Well, wh at do you do with the heroin?

A I snorted that, too.

Q You snorted that, too. You don't knwo when you did what?

A It was in '68?

Q '68.

What about '71.

A No.

Q Well, didn't you tell Mr. Clarey that you were using it, whatever it was you were using, pretty consistently and you had used it in '71?

A I don't remember saying that to him. If I did -

Q You don't remember saying that?

You didn't snort cocaine at all in '71, to your recollection, right?

A No, I don't think so.

Q Well, you smoked marijuana in '71?

A I don't -- I might have. I don't know, I --

Q Well, what about '72?

A No, I don't smoke reefer no more at all.

Q You don't smoke reefer no more.

Well, did you tell Mr. Freundlich or one of the

police officers -- and I will try and find it for you so we can be exact about it -- that after this job you went back and smoked reefer?

A Yes.

Q That was in '72, sir.

A That was in '72? That was in '71, wasn't it?

Q The bank job, if it occurred at all, was in '72, January 10, 1972? Do you recall back then?

A That's correct, I will say that's correct.

Q You mean -- do you have difficulty with dates?

A Somewhat.

MR. CLAREY: Objection.

THE WITNESS: It's been a long time.

THE COURT: Overruled. I will allow it to stand.

Q I mean, do you recall that this actually happened on January 10th, 1972 or just because somebody told you there was a bank robbery that day?

A No, I -- no, I was there. I know.

Q Well, where were you on January 14th, 1972, do you remember that?

A In a hotel on 42nd Street.

Q In a hotel on 42nd Street and what about on February 29th, 1972?

A February 29th, 1972?

Q Yes.

A I don't recall that.

Q You don't recall that but you remember specifically that this bank robbery that you took part in was January 10th?

A Yes.

Q I suggest to you, sir, the reason that you recall the exact date is because you have been told to remember the exact date.

A No, I was there, January 10th.

Q You were there.

Now, when Mr. Freundlich first talked to you did he use the words -- and be very careful about how you answer this -- did he use the words or the name Henry Brown when he asked you if you had any information on certain people? Did he say Henry Brown?

A No, he said the Black Lib --

THE COURT: Now, answer that yes or no.

Q He did not?

A No.

Q Well, did you know for some reason that he was interested in Henry Brown?

Answer that yes or no.

A Did I know whether he was interested in Henry Brown?

Q Yes.

A Not at that time.

Q You didn't know?

Well, you subsequently found out that he was interested in Henry Brown?

A Yes.

Q Right?

Without telling us what was said, when was that?

A I think after I that I told him what I knew.

Q Did he seem excited about what you told him about Henry Brown?

A Excited, you know, just --

Q He seemed enthusiastic?

A They all just listened, that's all.

Q They all just listened.

But you thought at that time that what you said about Henry Brown must have been pretty important to him,right?

A Yes, I would say so.

Q Were you surprised, by the way, to get immunity not only for yourself but for Miss Richardson?

A That's the only way I would turn States - -

Q Well, I understand that, sir, but were you

surprised?

I mean, you have been around the criminal justice system a while. That's unusual, isn't it, to get -- you know to get immunity for your testimony not only for yourself but for your crime-mate?

THE COURT: Do you know whether or not it's unusual?

THE WITNESS: No, it's not --

THE COURT: Yes, or no?

THE WITNESS: -- unusual.

THE COURT: It's not unusual.

BY MR. COHN;

Q Well, did you get immunity from the time before when you were convicted of whatever it was and went upstate?

A No.

Q You didn't get immunity then?

A No.

Q And what about the first arrest you told us about, the one for assault?

A That was dismissed, I believe.

Q Did you get immunity on it?

A I think that was dismissed.

Q That was dismissed. Okay.

By the way, sir, have you ever been

prosecuted -- you told this district attorney and police officers that you sold dope on the street, right? Or that at least you had agents who sold dope, right?

A Yes.

Q Have you ever been prosecuted for that?

A No.

Q Anybody ever told you that you would be prosecuted for that?

A No.

Q Did your attorney tell you -- your attorney was present at this meeting with Mr. Freundlich, right?

A Yes.

Q Did your attorney tell you: Don't worry about it, to tell them, you won't be prosecuted.

A No, he didn't say anything of that line.

Q Now, were you given immunity not only from the robbery, from one robbery, but for two robberies, because of your -- the information you gave?

A I am only charged with one.

Q Well, I read in pertinent part from page 2 of the transcript of that meeting on -- in March of '73?

MR. CLAREY: Objection.

THE COURT: May I see it?

MR. COHN: I am going to excise some of the

material.

THECOURT: May I see it, please.

MR. CLAREY: At any rate it's improper form.

THE COURT: Let me rule on that, Mr. Clarey.

May I have that, Mr. Lewis.

(Question read.)

THE COURT: The jury may be excused.

(jury out.)

MR. COHN: Your Honor, it was my intention if permitted to read the following from the top of page 22.

"Question: Jack, are you presently --"

THE COURT: Top of page 22?

MR. COHEN: Page 2, I am sorry.

THE COURT: Go ahead.

"Question: Jack are you presently incarcerated in the Brooklyn House of Detention?

"Answer: Yes.

"Question: And is that on a charge of robbery?

"Answer: Yes."

Then I would have skipped all the material about the Black Liberation Army and I would have said -- I would have read from --

"Question: In other words, you will not be

prosecuted for your robbery charge, and the same withthe other robbery that we discussed.

"Now, also, you are interested in Diane Richardson; is that correct?"

That was what I was going to read.

THE COURT: No objection.

MR. COHN: And ask him whether or not that question had been asked him.

THE COURT: What's wrong with that?

MR. CLAREY: Well, the proper form is to ask him if he 's been questioned about it and then read from the transcript.

I don't think he's even gone into the --

THE COURT: Well,the proper form is did you give these answers to these questions and that's the way Mr. Cohn is asking them.

MR. COHN: That's right. I apologize to confusing counsel with pertinent part but I am blocked from asking a number of -- you know, mentioning certain information.

MR. CLAREY: Well, I don't think --

THE COURT: Seat the jury, please.

MR. CLAREY: All rig-t.

MP flws. (continued next page)

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CROSS EXAMINATION

BY MR. COHN:

(The jury is in the jury box.)

THE COURT: You may continue, Mr. Cohn.

MR. COHN: Your Honor, with the Court's permission, can I have read back the part of the question --

THE COURT: Will you read back the question, please.

(Whereupon the above was read by the Reporter.)

THE COURT: Go ahead.

Q The question by Mr. Freundlich:

"Question: Jack are you presently incarcerated in the Brooklyn House of Detention?

"Answer: Yes.

"Question: Is that on the charge of robbery?

"Answer: Yes."

Part of the next question: "In other words, you will not be prosecuted for your robbery charge and the same with the other robbery we had discussed now, also you are interested in a Dianne Richardson, is that correct?

"Answer: Yes."

Do you recall those questions being asked?

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A Yes.

Q And did you give those answers?

A Yes.

Q So let me get this straight if I can, at the very least for this testimony, for this information which you gave to Mr. Freundlich, in 1973, you have not been prosecuted for at least one robbery, perhaps two, a sale of heroin --

MR. CLAREY: Objection to the form.

THE COURT: Overruled, I will allow it.

Q (continuing) sale of heroin and a bank robbery, on the bank robbery, is that correct?

A Yes.

Q At the very least.

And in addition your girlfriend has not been prosecuted for her participation in and on the robbery, right?

A Right.

Q Now, sir, would it be fair to say you consider that lack of prosecution to be payment for your testimony?

A Would I consider that? No.

Q You don't?

A No.

Q Would you have given that testimony unless you had been given whatever consideration it is you have been given here?

A Would I have given the testimony here?

Q I asked you first.

A I don't think so.

Q You don't think so.

In other words, sir, your testimony here is bought and paid for, right?

MR. CLAREY: Objection.

THE COURT: Overruled, I will allow it to be answered if you can.

THE WITNESS: Is it bought and paid for?

THE COURT: If you can answer yes or no, answer.

THE WITNESS: In a way, I don't know.

THE COURT: That is the answer, in a way.

Are you getting any cash consideration? Is the Government giving you any money?

THE WITNESS: No.

THE COURT: Paying your rent?

THE WITNESS: No.

MR. COHN: We will get to that. I might as well get to it now.

Q Are you working now?

A No.

Q How are you supporting yourself?

A I am living with my parents.

Q How old are you?

A Thirty.

Q How old are your parents?

A About fifty something.

Q Do your parents work?

A Yes.

Q Where do they live? You don't have to tell us the exact address, but the general neighborhood.

A In New York.

Q Is it in some neighborhood like Bed-Sty or East New York?

A No.

THE COURT: You mean in Manhattan when you say New York?

THE WITNESS: Manhattan.

Q What part of Manhattan? Again by general neighborhood.

A Forty-second Street.

Q Would you characterize your parents as well-to-do?

A They manage.

Q And what does your father do?

A Nothing.

Q What does your mother do for a living?

A Postal worker.

Q Are there children in the house?

A No.

Q How long, sir, have you been living with them?
A Since I got out of jail.
Q Since you got out of jail? When was that?
A December 10.
Q December 10 of '73?
A Yes.
Q So for some approximately five months, right?
A Yes.
Q Is Miss Richardson living with you?
A Yes.
Q Your family is supporting her too?
A No.
Q Does she work?
A Yes.
Q What does she do?
A She works for the Salvation Army.
Q She gets paid for that?
A Yes.
Q Now, tell us again, sir, if you will, how this -- first of all, do you know who Willy Wilcox is?
A Do I know him?
Q Do you know who he is?
A No.
Q Do you know that he was arrested for the bar robbery which you say you, Mr. Brown, and Mr. Green was it

you said committed?

A Yes.

Q Do you know he was arrested for it?

A I heard it mentioned somewhere.

Q You're a public-spirited citizen and you came forward and said I know --

A I told it when talking to the District Attorney.

Q That was when, March of '73, right?

A Yes.

Q Mr. Wilcox was arrested when, around December of --

A I didn't know he was arrested until I was over there in the District Attorney's office.

Q You told the District Attorney that Mr. Wilcox did not do it?

A No, I told him what I did.

Q And what other people he wanted to hear about?

A No.

Q You didn't tell him what other people did?

A I told him what other people did, about my involvment with other people.

Q Your involvement with other people?

A Yes.

Q Other people he wanted to hear about, right?

THE COURT: Objection sustained, it is

argumentative.

Q Now, tell us again, sir, what happened on December 12?

A We left from a bar on DeKalb and Nostrand and walked up to Lindy's Bar.

Q What was the bar?

A Steppy's.

Q S-T-E --

A I don't know how to spell it.

Q And you went to Lindy's?

A Yes.

Q What did you do?

A We went inside. Brown and Woody sat in the middle of the bar and I stayed on the end.

Q Then what happened?

A After a while, getting near closing time, we pulled guns.

Q You pulled a gun as well as everybody else?

A Yes.

Q What if anything was said and what if anything did you do?

A What?

Q Was anything said when you pulled guns?

A Announced it was a stick-up.

Q Who said that?

A All of us.

Q Like a chorus? What was the response? How many people were in the bar at that time?

A Six to eight people.

Q Were they all seated at the bar or at tables?

A Two barmaids and the rest were sitting at the bar.

Q Was there a bartender?

A Two barmaids.

Q And four customers?

A About that.

Q Plus yourselves?

A Yes.

Q Where was Patrolman Sutherland?

A At what time?

Q When you said stick-em-up.

A He wasn't there.

Q He wasn't there?

A No.

Q When was the first time you saw Patrolman Sutherland?

A After we had put them in the bathroom. He pulled up to the bar and Woody Green stuck a gun in his stomach or back, I don't know. I was in the back and they brought him to the back.

Q He pulled up to the bar, he came in the bar before Mr. Green --

A I can't say how he came up to the bar.

Q But he was inside the bar before Mr. Green stuck a gun in his back, right?

A I was in the back when I seen him. They were bringing him to the back.

Q What did you hear said to Patrolman Sutherland?

A Excuse me?

Q What if anything did you hear said to Patrolman Sutherland?

A I heard Woody say "He's a pig."

Q He's a pig?

A Yes.

Q Okay. Did you see what was done with Patrolman Sutherland?

A They searched him and made him take his clothes off.

Q They, you didn't take any part?

A I held a gun.

Q What kind of a gun?

A An old Smith and Wesson gun.

Q Colt?

THE COURT: Did you say Colt?

THE WITNESS: No, Smith and Wesson.

Q Did you say old or Colt?

A Old.

Q O-L-D?

A Yes.

Q Where did you get that gun?

A At Tom McQueary's house.

Q When you went back after the -- excuse me, after this event, you said that you and Mr. Brown had an altercation or argument about who would keep the 38 that you had gotten from Patrolman Sutherland, right?

A Yes.

Q You had already had a gun or did you give that back?

A It wasn't mine.

Q It wasn't yours?

A No.

Q Did Mr. Brown have a gun on that occasion?

A Yes.

Q What kind of a gun did he have?

A I believe it was a 38.

Q He already had a 38?

A Yes.

Q He wanted a matched pair?

A It wasn't his.

Q It wans't his either?

A No.

Q What about Mr. McQueary, did he have a gun on that night?

A He wasn't with us.

Q I'm sorry. What about Mr. Green?

A He had a gun.

Q Was it his?

A I assume so.

Q You assume so?

A Yes.

Q He never told you?

A No, sir.

Q Well, how, sir, do you know that Mr. Brown's gun wasn't his?

A I got the gun with him at McQueary's house.

Q You went and you both went and got guns from the arsenal?

A What?

THE COURT: Objection sustained.

Q Now, do you know anybody by the name of Charles Lee, Alfred Lee, somebody whose name is B, just the letter B, Phillip Gonzalez, also known as Junior Buck, Dianne Richardson who you do know, and a white male named Eddie? Does that ring a bell?

Yes.

Q Who are they?
A They were arrested with me in '68.
Q For what?
A Armed robbery.
Q It was a robbery gang, right?
A Something like that, if you can call it that.
Q You did more than one robbery then, didn't you?
A Yes.
Q How many would you say?
A I don't know.
Q Armed robberies, right?
A Armed robberies.
Q Bars, right?
A (No response.)
Q Did you do bars?
A No, sir.
Q What?
A Furniture stores.
Q Furniture stores. What else?
A Train station.
Q What else? Banks?
A Banks.
Q Did you ever shoot anybody?
A No.
Q Ever fire a weapon?

A No.

Q Anybody in the gang do that?

A No.

Q You were the leader of this gang, weren't you?

A No.

Q Who was?

A There wasn't any leader.

Q There wasn't any leader?

A No.

MR. COHN: May I have one moment, Your Honor?

THE COURT: Yes.

(pause.)

Q Now, it was for one of these robberies or more than one that you got your time in Green Haven, is that right?

A Yes.

Q Which one of them was that?

A I got five years in Nassau County and three years in Brooklyn running together.

Q So there were two separate ones, three years in Brooklyn --

A Yes.

Q What kind of establishments did you relieve the money from?

A Savings and loan places.

Q Savings and Loan?

A Yes.

Q Like a bank?

A Yes.

Q Was that a federal charge or was that a state charge?

A A state charge.

Q And the ones in Nassau, what kind of establishments did you relieve money from there?

A Train station.

Q Train station?

A Yes.

Q At that time, sir, did you turn evidence against all your co-actors?

A No.

Q Why is that, because they didn't make the price high enough?

A They asked me --

MR. CLAREY: Objection.

THE COURT: Overruled, I will allow it.

A They asked me to testify.

Q You refused?

A Yes.

Q Why is that, because they wouldn't give you enough? They wouldn't give you immunity?

A They would have.

Q They would have given you total immunity?

A Yes.

Q But you refused?

A Yes.

(continued on next page.)

Q All right. So you went back, you finished with this robbery. You took the -- who took the gun from Patrolman Sutherland?

A Woody Green.

Q How long were the three of you in the presence of Patrolman Sutherland, would you say?

A About fifteen or twenty minutes.

Q Where?

In what part of the bar? In the bathroom?

A No, the bathroom and like the kitchen area.

Q There were lights there?

A Some lights, yes.

Q You weren't masked, were you?

A No.

Q None of you?

A No.

Q Would it be fair to say, Patrolman Sutherland had plenty of opportunity to observe all of you?

A Yes.

Q Now, after you got back -- where did you go from the bar?

A Bainbridge and Reed.

Q I am sorry?

A Bainbridge and Reed.

Q I am sorry?

A Bainbridge and Reed.

Q Whose apartment was that?

A Woody Green's.

Q And what occurred there?

What transpired?

A We split up the money and the jewelry.

Q The money from the bar robbery?

A Yes.

Q How much was that?

A I think about one hundred and something dollars.

Q Was that total, or your share?

A My share.

Q Plus the jewelry?

A Yes.

Q Then you squabbled with Mr. Brown, you say?

A Yes.

Q By the way, what did you call Mr. Brown?

A Brown.

Q You called him Brown?

A Yes.

Q How many years do you know Mr. Brown?

A About fifteen .

Q You were kids together?

A Yes.

Q On the block?

A Yes.

Q And that is what you always called him?

A Brown or --

Q Isn't his name Jay Jay?

A I never called him Jay Jay.

Q Did you ever hear other people call him Jay Jay?

A Yes.

Q But you didn't?

A No.

Q Were you friends?

A Yes.

Q You hung out together?

A Sometimes.

Q Now, what was the nature of this argument that you had with Mr. Brown over the gun, and you related to us? Do you remember the words?

A I asked for the gun, because I didn't have any. Brown didn't have none either; so I wanted the gun. He said "No, I got to it first."

Q Did you resent that?

A No.

Q You wanted the gun, right?

A Not that bad.

Q You wanted a gun of your own for what reason, sir?

A I just wanted a gun of my own, that's all.

Q It's not a teddybear, you weren't going to sleep with it, what did you want it for?

THE COURT: Strike out Mr. Cohn's allusion to the teddybear. Please reframe the question.

Q Did you want it for collection purposes or some other purpose? Did you want it so you could do other jobs with it?

A Maybe.

Q Maybe what?

A Maybe I wanted it for other jobs.

Q Did you or didn't you? You know, I wasn't there.

A I couldn't say.

Q You --

A I couldn't say if I was ever going to stick up again after that.

Q I am sorry?

A I couldn't say if I was ever going to stick up again after that.

Q Well, --

A I didn't know then.

Q Mr. Roland, at that point in your life, you had been sticking up for some six years, right?

A (No response).

Q Off and on, when you were committed?

A Off and on.

Q Is that fair to say?

A Yes.

Q It was hard to do it from Greenhaven, wasn't it?

THE COURT: Strike that.

MR. COHN: I apologize.

Q You didn't know why you wanted the gun, you might have wanted it for other stickups?

A Possibly.

Q Isn't it a fact that you knew that was the way you were going to raise money in the future to get into the dope business, where you really thought therewas a killing to be made and you needed a gun to raise the capital?

A No.

MR. CLAREY: Objection, your Honor.

THE COURT: I will allow it to stand. He already answered no.

MR. COHN: Your Honor, would it be asking too much if we recessed at this time?

THE COURT: All right, we will suspend at

this time. The case will continue promptly at ten o'clock tomorrow.

Again, I ask the jury not to listen to news broadcasts, or read newspapers. Please keep an open mind. Don't discuss the case with anyone. Again, not even with your spouses, children, personal friends.

Don't talk about it confidentially. And when you reassemble tomorrow, please don't discuss it amongst yourselves.

Please try to get in by nine thirty or twenty minutes of ten. Again, don't register downstairs, just come right on up. The jury is excused.

(The jury left the courtroom.)

MR. CLAREY: I want to make sure he is coming back tomorrow.

THE COURT: Go outtand tell him. I don't know why there should be a question about it.

(Pause).

THE COURT: Do I understand the Government has one witness after this?

MR. CLAREY: Four witnesses, but they are very brief. Two experts, and two other witnesses.

THE COURT: There is a possibility the Government's case might be completed by one o'clock tomorrow?

MR. CLAREY: A very good possibility, your Honor.

THE COURT: Will you be prepared to proceed at that time?

MR. COHN: I subpoenaed what witnesses I expect for tomorrow morning. I don't know what else may turn up. I am going to try.

THE COURT: I want to make sure the witnesses are prepared to go on.

MR. COHN: I will try. It is quite difficult for me to say yes. I am trying not to hold the Court up.

THE COURT: That's all I ask for. Just make an effort, gentlemen.

I expect to start promptly tomorrow. If you have any motion, either side, call the other side and call my office and just say you want to make some applications or have some discussion. I would like requests to charge, if you can possibly bring them in by one o'clock tomorrow.

MR. CLAREY: I will try.

THE COURT: I am not going to hold you to it.

MR. CLAREY: I can't think of any requests other than aiding and abetting and accomplice testimony which is boilerplate.

I have heard your charge before, and I have no objection.

MR. COHN: Your Honor, just one matter. I would ask the Court if it would ask Mr. Clarey if he would call the Department of Correction. They won't speak to me. In the past, they haven't spoken to me. I would like you to ask Mr. Clarey to ask them if this witness said -- he may have seen a psychiatrist when he was up there.

THE COURT: The examination he described, is the usual talk you have with a social worker.

Everyone who is an inmate gets a psychiatric examination. That doesn't mean he is suffering from any illness.

MR. COHN: We don't know until we see the report.

THE COURT: Call.

MR. CLAREY: I will call Greenhaven tomorrow morning.

THE COURT: If they can give you a report, ask them to give it to you over the telephone.

MR. CLAREY: If there is a report I will let Mr. Cohen come into my office, and we will both listen to it on the telephone.

I ask Mr. Cohn if there were any alibi witnesses and he told me no.

I wonder if that has changed?

MR. COHN: No.

THE COURT: All right.

MR. CLAREY: No alibi defense for either --

THE COURT: That is a voluntary answer.

MR. COHN: I told you before, I don't represent anything about December 12th. I told you there was no alibi as to the chief event in question.

MR. CLAREY: I will wait until tomorrow to find out about the other.

THE COURT: I hope to start promptly at ten o'clock. If you have something before, please let us knowand we can argue before the jury comes in.

(A recess was taken at this time, until May 8, 1974, at ten A.M.)

. . . . . .

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

HENRY STUART BROWN, : 73-CR-960

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

May 8, 1974
10:00 o'clock a.m.

B e f o r e:

HONORABLE JACOB MISHLER, CHIEF U.S.D.J.

and a Jury

MICHAEL PICOZZI
OFFICIAL COURT REPORTER

Appearances:

EDWARD J. BOYD V, ESQ.,
United States Attorney
for the Eastern District of New York

BY: ROBERT L. CLAREY, ESQ.,
Assistant United States Attorney

FREDERICK COHN, ESQ.,
Attorney for the defendant

(Jury not present)

MR. COHN: Your Honor, I had a matter to take up but I find on a careful reading of the transcript that I don't have a matter to take up.

THE COURT: All right, bring the defendant in.

(The defendant is in the courtroom at this time.

THE COURT: Seat the jury.

Is Mr. Roland here?

MR. CLAREY: That is the problem. I instructed him to be here at 9:15.

THE COURT: Hold the jury.

MR. CLAREY: We are calling him right now to make sure he left the house.

He was instructed by both Agent Murphy and myself to be here at 9:15. He didn't come. It is now 10:00 o'clock.

MR. COHN: Your Honor, we could perhaps use a few minutes of the time. I know it is not much but just to have Mr. Brown pass before the jury to look at his hairline.

THE COURT: The problem is Mr. Roland. We can always do that.

MR. CLAREY: I could have another witness here. I could call them out of order.

THE COURT: Let's find Mr. Roland. I want to

know where he is. That is why I hoped to complete yesterday.

MR. CLAREY: How much more cross-examination do you say you have?

MR. COHN: Maybe fifteen minutes or a half-hour.

MR. CLAREY: Agent Murphy has just spoken to Mr. Roland's mother and she said he left a half-hour ago to get here.

THE COURT: He left at 9:30 to get here --

MR. CLAREY: He left at 9:30 to get here a quarter after nine.

Oh, he's here now.

MR. COHN: Mr. Brown has asked me this morning if the Court would permit him to make an application directly to the Court.

THE COURT: Go ahead, Mr. Brown.

THE DEFENDANT BROWN: I would like to be assigned co-counsel and given the privilege of cross-examining witnesses. I would like to be given the privilege of cross-examining the witnesses.

THE COURT: What questions do you want to ask him?

MR. CLAREY: Shall I ask the witness to leave the room?

Mr. Roland, will you step outside the door, please?

(Witness excused.)

THE COURT: What questions do you want to ask him, Mr. Brown?

THE DEFENDANT BROWN: What was his share of the money. The people that were there. And how long did he spend there and also what did he have on on that day.

THE COURT: What?

THE DEFENDANT: What did he have on that day. What did he wear.

THE COURT: You are talking about the day of the bankrobbery?

THE DEFENDANT BROWN: Yes. That is all.

MR. COHN: I am sorry, I am ready to proceed now.

THE COURT: I deny the application on the ground all those questions were asked.

THE DEFENDANT BROWN: I ain't heard nobody ask him what he had on.

THE COURT: That I wouldn't allow. It is quite immaterial.

THE DEFENDANT BROWN: I don't think so.

THE COURT: Will you please bring Mr. Roland in

in a hurry. I am trying to overcome problems, please, with your cooperation, Mr. Clarey.

MR. CLAREY: I will bring him in, your Honor.

THE COURT: Seat the jury, please.

(The jury is in the jury box.)

W I L B U R R O L A N D , called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

THE COURT: I believe we are ready to proceed, Mr. Cohn.

MR. COHN: I am, your Honor, thank you.

CROSS-EXAMINATION

BY MR. COHN: (Cont.)

Q Now, Mr. Roland, I believe yesterday you told us that you -- withdrawn.

You made this statement to Mr. Freundlich in March of 1973, right?

A Yes.

Q I believe yesterday you told us that you got out of somewhere or other December 1972, right?

A Yes.

Q Were you held as a material witness during the time from March until December?

A I don't really know.

Q Were you being held -- were you being held in

a place other than a jail institution?

A No.

Q You were in jail?

A Yes.

Q Okay.

Now, since March of 1973, until now, have you spoken -- without giving us their names -- to other prosecutors other than Mr. Clarey and Mr. Freundlich?

A Yes.

Q On how many occasions, if you remember?

A Once or twice.

Q Did they take any notes or have any transcription machines while you were making those statements?

A Not that I remember.

Q Have you testified in any other case?

A No.

Q Have you testified before a Grand Jury?

A No.

Q So, sir, is it fair to say this is the only court proceeding which you have been involved in as a witness, is this case against Henry Stuart Brown, since March 26, 1972?

A Yes.

Q On the basis of that, sir, you got all that

immunity and immunity for your girl friend, too?

MR. CLAREY: Objection, it is argumentative.

THE COURT: Overruled. I will allow it.

Q Is that right?

A Yes.

Q Now, on January 9, the night of January 9, Sunday night before the bankrobbery, you said that you and one of the persons -- who was the other person that went with you to --

A Woody Green.

Q Was it a Kinney's place, a Kinney rent-a-car?

A I believe it was Hertz.

Q What time of night did you get there?

A About -- I don't know, eight or nine o'clock. Ten o'clock.

Q Did you wear masks?

A No.

Q How far away from Bainbridge St. was this Hertz Rent-A-Car place?

A Quite a distance.

Q A mile, two miles?

A Might be about a mile and a half.

Q It is in Brooklyn?

A Yes.

Q Do you remember the address?

A No.

Q Did you blindfold the attendant?

A I don't remember blindfolding him.

Q The first thing you wanted as a Cadillac, right?

A Yes.

Q Had the attendant told you it was too difficult to get it so you settled for something not quite as classy?

A Yes.

Q What kind of a car was it?

A A small car. I don't know what the model was.

Q You couldn't get a Cadillac so anything would do?

A That's right.

Q Then you went and took it and you parked it by the bank?

A On Kosciusko and Sumner.

Q Around the corner from the bank?

A Yes.

Q That is an area, sir, is it not, where there is a lot of traffic, cars go back and forth there and there are people on the street a good percentage of the time?

A Yes.

Q Did you leave this attendant at the Hertz

Rent-A-Car bound and gagged?

A Yes.

Q Do you know whether he got free from 9:00 o'clock the next morning?

A No.

Q By the way, you haven't been prosecuted for the sticking up of the Hertz Rent-A-Car place, have you?

A No.

Q Did you have a gun that time, too?

A Yes.

Q What gun was that?

A The same one I had been using.

Q Thomas McQuery's gun?

A Yes.

Q He also gave you the same gun when you went out on other jobs?

A Yes, most of the time.

Q You checked the serial number and --

A It is a big old long Smith & Wesson gun (indicating).

Q About a foot long?

A This long (indicating).

THE COURT: Let's measure it since there is a question.

Put your hands up again.

THE WITNESS: This long (indicating).

THE COURT: About nine inches.

Q A nine-inch-long gun.

This same small car, after the bankrobbery, you drove it back to Bainbridge, right?

A Yes.

Q Dropped off whoever you say you dropped off and parked it two blocks away?

A About that.

Q This was a stolen car?

A Yes.

Q What time of day was that?

A About 7:10, I believe.

Q I'm sorry?

A In the morning.

Q 7:10?

A No.

Q I can't hear you.

A Something to ten.

Q Something to ten, I see.

There was already traffic in the street?

A Wasn't that much.

Q What route did you take from the bank to

Bainbridge?

A Sumner Avenue straight down to Bainbridge.

Q Then there is a left or right turn?

A Left turn.

Q You went straight down Bainbridge for two blocks and parked on Bainbridge?

A Yes.

Q Weren't you concerned that this vehicle had been stolen some ten hours ago and might be hot and they might go looking for it?

A That's why I got out of it.

Q You used it at 9:00 o'clock in the morning?

A Yes.

Q What time was it that you stole it?

A It was at night.

Q What time?

A 9:00 or 10:00 o'clock.

Q About twelve hours before?

A Something like that.

Q Are you aware, sir, whether or not rented cars have certain license plates that designate that they are rented cars?

A Yes.

Q Do they?

Q Mr. Roland, you knew when he said everything

A I believe so.

Q So there was a possibility not only that the police might be looking for a stolen car of whatever description that was --

MR. CLAREY: Objection. This is argumentative. It is summation.

THE COURT: Let me have the last question.

MR. COHN: I will rephrase it.

Q There was a possibility that the police would not only be looking for a car of a particular description of the car that you had but they would be further helped in their search for the car because it would obviously be a rented car?

A Yes.

Q Nevertheless, you drove this stolen vehicle down the street in broad daylight, dropped off the three men --

A That is correct.

Q Who now I suppose have taken off their masks by that time?

A Yes.

Q And proceeded down the block and parked it just two blocks away from where you were going to be?

A Yes.

Q And forgot about it?

A Yes.

Q Did you leave the keys in the car?

A I don't remember if I did or not.

Q Now, there is one more thing I am not clear of, sir, then I will conclude.

You told us yesterday, I believe on cross-examination, that you had a conversation with Mr. Freundlich a week before you decided to cooperate?

A Yes.

Q Is that right?

A Yes.

Q Do you recall the date of that at all?

A Do I recall the date?

Q Yes.

A No, I don't.

Q You don't?

A Not the exact date, no.

Q Do you recall the approximate date?

A No.

Q Was it the 17th or 23rd?

A No.

Q Do you know what month it was?

A It was -- not March, I believe it was April.

Q It was April?

A I believe so.

Q You have that first conversation with him?

A The first conversation with him?

Q In which he said, if you'll cooperate we will give you all this immunity and your girl friend, too, then you said I got to think about it -- when was that?

THE WITNESS: I don't know, I was in jail so I don't know.

Q They don't have calendars in jail?

THE COURT: Objection sustained.

Q It was either March or April?

A Yes.

Q Of what year?

A 1973, I believe.

Q Was that conversation taken down, transcribed in any way, to your recollection?

A When I decided to turn evidence?

Q Before that.

A No.

Q Did your lawyer take any notes?

A No.

Q So it is your testimony, sir, that some time in March or April you had this conversation with Mr. Freundlich and he promised you immunity to testify against

-- if you testified against whom?

MR. CLAREY: Objection.

THE COURT: Objection sustained.

Q What was the conversation that you had with Mr. Freundlich at that first meeting?

A He asked me --

THE COURT: Wait, now. The jury may be excused.

(continued next page)

(The followingtook place outside the presence of the jury.)

THE COURT: Did Mr. Roland, I assume you were instructed not to make any reference to the Black Liberation Army or your association --

MR. COHN: I'm sorry, it slipped my mind. I didn't --

THE COURT: Let me get the question.

THE WITNESS: I would have to say yes if he asked do I know anything about the Black Liberation Army.

THE COURT: What conversation did you have with Mr. Freundlich for the first time I think was the question.

THE WITNESS: That was the first time, in the beginning?

MR. COHN: I didn't hear.

THE COURT: The conversation was concerning the Black Liberation Army, he said.

MR. COHN: As long as the jury is out, might we have that on the record?

THE COURT: Go ahead.

EXAMINATION BY MR. COHN:

Q What was the conversation?

A I believe he said if I gave him any information about the Black Liberation Army or helped him he would give me immunity.

THE COURT: Did you admit membership in that organization?

THE WITNESS: No.

Q You claimed, did you not, to know something about the BLA?

A No.

Q How did it happen that you arrived in his office and he asked you that question? He didn't question every prisoner in Brooklyn,did he?

THE COURT: Objection sustained.

Q How did that conversation originate? How did it take place if you know?

A Because of the bank robbery I believe. I don't know exactly how I got there, but I got there.

THE COURT: Did he tell you why he selected that subject matter for your inquiry?

THE WITNESS: No.

Q You gave no indication you might know something about the BLA?

A No.

Q When was the first time you told him you --

A I told him I nver heard of the BLA.

Q You told him about it some time or other, didn't you?

A What?

Q In this transcript. The Black Liberation Army is mentioned.

A The term Black Liberation Army, but I told him I don't know nothing about no Black Liberation Army.

Q You began or this transcript begins -- I read part of this before and I will now read the whole thing to the records. I excised that part before the jury.

THE COURT: Go ahead.

MR. COHN: It is on page 2.

MR. CLAREY: It is an Exhibit.

MR. COHN: "Question: I am willing to make you an offer and this is the offer that I will put on the record at this time. The information you give us about the different robberies involving the Black Liberation Army specifically to an incident with the hand grenade in Queens and the killing of two policemen in Manhattan. If this is information that checks out to be correct, if this information also helps your testimony what you have to do is testify in the Grand Jury and the trial, we can take your case Jack and we will dismiss it. In other words, you will not be prosecuted for your robbery charge and the same with the other robbery we discussed.

Now you are also interested in Dianne Richardson, is that correct?"

A That is correct.

Q Now, at the time, sir, Mr. Freundlich had reason to believe that you knew something about these events which involved --

THE COURT: Sustained as to form. You are assuming the fact that there is no basis for. Ask him whether he had given Mr. Freundlich any reason to believe or whether he knows any reason. Not assume that Mr. Freundlich had any reason to believe. You know assistants just use that as a tool and you can tell by Mr. Freundlich's question that he didn't know what he was talking about.

MR. COHN: This when this was there and he was asked.

THE COURT: Ask him what he knows, don't ask him what Mr. Freundlich knows. Maybe Mr. Freundlich doesn't even know what he knows.

Q Mr. Roland, as a matter of fact, in this transcript you did give information, some information about a hand grenade, did you not?

A Yes.

Q You did give some information about the killing of the police officers, did you not?

A Yes.

Q These were -- this information then was all about persons, Brown, McQueary, Kearney, Jackson, Woody Green?

A Yes.

Q Was it your understanding these people were members of the Black Liberation Army?

A Yes.

Q At the time Mr. Freundlich asked you this question, which I read to you from page 2, it was not without basis in some fact that he was asking if you have information and indeed you did, is that right?

THE COURT: Sustained as to form. There are four questions there. One at a time.

Q You did have at this time of this interview information about activities of members of the Black Liberation Army, right?

A I don't understand that.

Q Did you at the time of this interview have information or claim to have information about activities of certain persons who were members of the Black Liberation Army?

A Yes.

Q You did?

A Yes.

Q How, sir, if you know, did Mr. Freundlich know that you had that information?

A I didn't know.

Q I'm sorry?

A I didn't know.

Q "I didn't know?"

A I didn't know whether he knew that I had the information or not.

Q You had communicated that to no one, is that right?

A No. Not until I went to his office.

Q Had you communicated it to --

THE COURT: Noah?

MR. COHN: No, no one.

THE COURT: Oh.

Q Had you communicated it to a police officer?

A No.

Q Had you ever met before that date a detective Arzizzone?

A I don't know. I might have seen him.

Q Had you talked to any detective in the jail before you went to Mr. Freundlich?

A No.

Q So you have absolutely no idea where Mr. Freundlich got this information that you might have information?

A No.

Q Yes, you have no idea, no, is that the answer?

THE COURT: Do you have any idea where Mr. Freundlich got the idea that you knew something about the Black Liberation Army?

THE WITNESS: No. He. He puts another word in as a question.

THE COURT: It is difficult to answer in the negative, that's why it was rephrased.

MR. COHN: Your Honor, I will ask this question because I don't know whether I should ask it in front of the jury. I will try it now and get a preliminary ruling.

THE COURT: Go ahead.

Q In April of 1973 you were in the Brooklyn House, right?

A Brooklyn House of Detention?

Q Yes.

A Yes.

Q On Atlantic Avenue?

A Yes.

Q Were you seeing the District Attorney or any other law enforcement officer regularly during that time?

A In April?

Q Yes.

A They were calling me.

Q They were calling you?

A Yes.

Q On the phone?

A Trying to see me.

Q You wouldn't see them?

A No, not until I contacted my lawyer.

Q Did you see them subsequently?

A I believe so.

Q Often?

A Not too often.

Q How often?

A About twice.

Q Twice?

A Twice.

THE COURT: Are you ready now, Mr. Cohn?

MR. COHN: I believe so.

THE COURT: Seat the jury.

MR. CLAREY: Is there going to be an inquiry about the Black Liberation Army?

THE COURT: No. I ruled on that so many times. I instructed the witness not to mention it. If a question calls for an answer that you would give this kind of information, turn to me and say you can't answer that and I will excuse the jury.

MR. COHN: I will try to be careful. I think I have been, Your Honor.

THE COURT: I think you are making a conscious effort to stay away from the subject.

(The jury is in the jury box.)

MR. COHN: Your Honor, I will withdraw the question previously put and phrase it another way with the Court's permission.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. COHN: (continuing)

Q On the day of that first meeting with Mr. Freundlich, is it a fair statement of the substance of the conversation that Mr. Freundlich told you that there was certain information he would like to have and if you could deliver it he would see that everything pending against you was dropped?

A Yes, I believe so.

Q You didn't make up your mind that day?

A No.

Q The reason you didn't make up your mind that day is because you didn't know whether or not you wanted to cooperate or because you hadn't made up a story yet?

MR. CLAREY: Objection.

THE COURT: Sustained as to form.

Q How long before you had -- how long before you has the next conversation?

THE COURT: We have gone over this a number of times. I am giving you a wide latitude but do not waste time.

MR. COHN: Is that question barred?

THE COURT: No, go ahead and ask the preliminary question.

Q How long before you saw Mr. Freundlich again after that first conversation?

A I believe the next week or the next day, I don't remember.

Q You don't know?

A No.

Q Was it a week or a day?

A A couple of days or a week.

Q Was it more than a week?

A No, I don't think so.

Q It was after you had time to think about the offer that you went back and decided to cooperate, right?

A Yes. After I talked to my attorney.

Q After you thought about it?

A I didn't have to think about it.

Q Mr. Roland, you have been around the criminal justice system --

THE COURT: That has been asked a number of times too and the jury has heard it.

Q Mr. Roland, you knew when he said everything against you would be dropped what that meant, didn't you, on the first meeting?

A Yes.

Q And finished, ended, no more prosecution, right?

A Yes.

Q You had to go talk to your lawyer as to whether or not that would be good for you, right?

A I wanted to make sure.

Q You wanted to make sure it would be good for you?

A Yes. Something --

MR. COHN: All right, I have no further questions.

THE COURT: Any redirect, Mr. Clarey?

MR. CLAREY: No redirect, Your Honor.

THE COURT: You may step down. Next witness, Mr. Clarey.

MR. COHN: Your Honor, I --

THE COURT: Wait.

MR. COHN: My client called to my attention one question he would like to ask.

THE COURT: You can ask it.

THE DEFENDANT BROWN: Me?

THE COURT: No, the lawyer.

MR. COHN: From there?

THE COURT: Sit down, Mr. Roland.

Q Did you have a nickname in the neighborhood?

A Yes.

Q What was that?

A Jack.

Q Were you also known as Jack the Ripper?

A A long time ago.

THE COURT: You may step down. Next witness, Mr. Clarey.

MR. CLAREY: Mr. Webb.

F R E D E R I C K E. W E B B, a witness called on behalf of United States of America, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. CLAREY:

Q What is your occupation?

Can we have an easel now, Your Honor?

THE COURT: To use it right now?

MR. CLAREY: In the meantime, may I have a side bar?

THE COURT: All right.

(The following takes place at the side bar.)

MR. CLAREY: There is a photograph in this Exhibit which we took in Mr. Cohn's presence and I

would like to stipulate that this is a photograph of Mr. Brown.

MR. COHN: I will stipulate but I object to the entry of these comparison photographs alongside these for comparative grounds.

THE COURT: Don't show it yet until you qualify the expert.

I think I ought to exclude the jury to hear this.

MR. COHN: I think so.

(The following took place in open court.)

THE COURT: The jury may be excused for a few moments.

(continued on next page.

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(Out of hearing of the jury.)

(The jury withdrew from the courtroom at 10:40 A.M.)

THE COURT: First, let the exhibit be marked for identification so we know what we are talking about.

THE CLERK: Seven photographs on large card marked Government's Exhibit 31 for identification.

THE COURT: Mr. Cohn, I would only suggest that maybe the witness ought to be here for an examination so you know what you are objecting on.

MR. COHN: Before I lay out the theory on what I am going to do, so that the Court could follow it, I would rather not lay out the theory before the witness.

THE COURT: All right.

MR. COHN: May I be heard, your Honor?

THE COURT: Yes.

(The witness withdrew from the courtroom.)

MR. COHN: Your Honor, these are three different sets of photographs. The top photographs are the surveillance pictures from the bankrobbery. The bottom photographs are two pictures that were taken by Special Agent Fox, I believe, on the 19th of last month.

MR. CLAREY: That is approximately it.

MR. COHN: At the direction of the Court and then there is a small photograph which is a mug shot of Mr. Brown from the -- well, it is from St. Louis where he is currently a sentenced prisoner.

Now, the purpose, I believe, of introducing these photographs in this manner is so that a person may make a comparison of common and facial features of those exhibits and state for the jury whether or not this person in the surveillance pictures which is, I assume, the person with the glasses, that they are going to be talking about --

THE COURT: Described as No. 1.

MR. COHN: Yes. And is the same person as in the comparison photo which we will stipulate is that of Mr. Brown as well as the person in the mug shot.

Now, there are two prongs to my objection -- well, it is a multiple objection.

There will be an objection to the comparison photos per se and there will be an objection to the expert testimony using those comparison photos.

The photos were taken with greatly different cameras.

The surveillance picture was taken with a Mosler bank surveillance camera. I do not know the lens specifications. The bank won't talk to me.

THE COURT: How would we know without asking the expert whether that is a significant difference?

MR. COHN: I am prepared to cite a very lengthy article in a law review article on comparison of photographsand what they mean.

I have a copy of it which I will be glad to give to the Court. The name of the article is Technical Preparation and Exclusion of Photographic Evidence by Joseph E. Fischneller, Jr., which is in the Gazalik Law Review Spring of 1973.

I hand a copy to the Court.

What the gist of that article is and Mr. Fischneller is a photographer and a forensic photographer, I gather from the article, is that unless a camera article's lenses, lighting conditions are the same, it is impossible to take that close identity.

For instance, if this witness is going to testify that the measurement of the nose is the same in the photograph of the surveillance and the photograph for comparison, one of the things you will now note from that exhibit is first of all the very grainy quality of the blow-ups and they are big blow-ups of those photographs and also the comparison photograph is blown up.

THE COURT: How about rough comparisons, for example, I think one of the witnesses said that the No. 1 man, and I may be wrong, was six foot one or six foot two or six foot three and now is an expert able to testify that some of these photographs the No. 1 man was the same size as Mr. Brown?

MR. CLAREY: That is a separate exhibit. We have sent Mr. Webb-- I will start with that, we have sent Mr. Webb another exhibit.

THE COURT: All right.

MR. CLAREY: He is going to testify as to height.

MR. COHN: The answer to your question from those, I don't believe he could.

THE COURT: I just want to see if there is a basis.

Let us assume he could express an opinion that the perpetrator, No. 1, was about the same height as Mr. Brown. Would that be admissible?

MR. COHN: If he could?

THE COURT: Yes.

MR. COHN: Yes.

THE COURT: All right.

MR. COHN: But not from those pictures.

THE COURT: I understand. They have to be

full-length.

MR. COHN: No.

What I assume he is going to say is he took one of the surveillance pictures and measured over a spot in the picture and measured it in the bank. That I assume is going to be the thrust here.

MR. CLAREY: Essentially, he is correct. Here is a picture of him going out of the door and Agent Murphy measured the height of the door and the height of the door handle.

Now, Mr. Webb took those measurements and analyzed the phctograph and came up with certain measurements of the man leaving that bank.

MR. COHN: That exhibit will also depend on the angle of the camera. If you are looking down over somebody' head it is hard to tell where the mark of the head is.

That is why when you measure somebody against a wall you have to use a flat ruler.

THE COURT: There is a hat there and I don't know how high the hat is or I don't know whether he had a wig on under the hat and we can only talk on approximations and not within a tenth of a milimeter.

MR. COHN: The testimony then becomes so speculative that it is worthless.

A jury hears an expert and he will be qualified as an expert I am sure --

THE COURT: What happened in the Fernandez case, was an objection made to the introduction of that evidence?

MR. COHN: Not on this ground.

MR. CLAREY: It did not become an appellate issue.

There was some hassle in the trial.

THE COURT: I thought there was.

MR. CLAREY: In that case the defense brought in an expert to prove the man in the picture was not Fernandez and it did not work.

THE COURT: Counsel in that case as I recall it raised every point in the evidence and I assume it was ruled on.

MR. COHN: It does not appear in the appellate opinion. If they take a picture that was originally three by two and another one four by five and they blow them up to the same size, how do they know the size?

The make an assumption and this is the same person and they try to --

THE COURT: I really think, I understand your argument, but I really think to make an intelligent

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determination would require some testimony as to what his opinion is going to be.

MR. CLAREY: I will make a very brief offer of proof.

THE COURT: I thought I had the slip opinion of Fernandez in the file, but I cannot locate it immediately.

I do have something. It seems to me in point, but -- no, it is not. It is on another point in the case.

MR. COHN: Before we get to taking evidence, I think it would be appropriate and that is rather than have an expert, they have the surveillance picture and the jury has Mr. Brown and I don't know, you know, bringing an expert in and this was litigated but from the defense's point of view, which you know, that is their case and not mine, that where you have the surveillance pictures and Mr. Brown here making no effort to hide under the table, they can compare those things and bringing an expert only puts a gloss over it which is not fair, although I am sure you will charge on expert testimony, but the weight they give it is their own, that it is not testimony of great weight.

Nevertheless, I believe it puts a gloss on it

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(The following occurred out of the hearing of the Jury.)

THE COURT: May I know his qualifications to testify on that subject matter?

MR. CLAREY: I don't have them memorized. He works for the FBI and a document specialist which includes handwriting. Forseveral years I will guess, several hundred photographs and made comparisons of this type, and he has testified many, many times in criminal cases.

He testified in Fernandez, --

MR. COHEN: Before you say the general shape.

MR. CLAREY: In one of the FErnandez cases, I think the third --

MR. COHEN: That general shape of features is not dependent on photography. I suggest you read this angle on angular distortions in lenses.

THE COURT: Suppose there was some disfiguring mark on the face, like a scar, could not someone come in and testify as to the precise location? I shouldn't use precise, because you will argue against that, as to the location of the scar and the length of the scar to show it's the same scar on the same face.

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MR. COHEN: Is that a witness who saw the scar, sure?

THE COURT: I'm talking about an expert who might have to make measurements. The average layman can't make measurements.

MR. COHEN: If the exact location of a scar in terms of millimeters in a case, I can't imagine a fact pattern that it might be, it would have to be bizarre, perhaps, yes, but that's not the situation here.

They are not saying from observing Mr.Brown, his nose is three millimeters away --

MR. CLAREY: We're not talking about millimeters but shape of features.

THE COURT: Yes.

In other words, the fact that the perpetrator might have a high cheek bone, might have a flat or --

MR. CLAREY: A pointed chin.

THE COURT: Might have a pointed or rounded chin. These might be coincidences, but when you get a series of coincidences, where one face has all these features, it might very well rise to the level of proof.

MR. CLAREY: His conclusion is obvious that he's not going to state positively like a fingerprint

expert that Brown is the man in the photo. The report is obvious.

THE COURT: I don't see the report. May I see the report?

MR. COHEN: That's the report given to me yesterday which I complained about so bitterly.

THE COURT: You read it since yesterday, I assume.

MR. COHEN: Yes.

THE COURT: Is this an extra copy?

MR. CLAREY: That's the original. Here's the copy that's been marked as an exhibit.

THE COURT: If you wish I will permit Mr. CLarey to qualify him and I will permit examination on his qualifications and I'll permit some examination as to the reliability in his opinion, I'll permit it first outside the hearing of the jury. Please call the witness.

(Continued on the next page.)

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F R E D E R I C K E. W E B B, having been duly sworn by the Clerk of the Court, resumed the Stand and testified further as follows, out of the hearing of the Jury.

MR. COHEN: At some time today, if I could borrow back that Gonzaga Law Review article, I will make another copy of it.

MR. CLAREY: The pictures on the exhibit in front of you are from the surveillance film already in evidence, and the bottom pictures are actual photographs of Mr. Brown.

MR. COHEN: That's a representation I have already made. Thank you.

DIRECT EXAMINATION

BY MR. CLAREY:

THE COURT: Do you require the exhibit which is now being marked -- marked Exhibit 31 for identification?

MR. CLAREY: Would you explain to Mr.Webb --

THE COURT: This is a preliminary hearing first to determine your qualifications to express an opinion on the matter for which you were called to Court, and secondly, for me to make a determination whether the evidence -- whether your opinion in particular is admissible, and that depends on whether I believe that it's reliable or purely

speculative.

I'd like to know something about your background and how many times you have testified. I'd like toknow for my own information. I understand you testified for the Government in U.S. v Fernandez.

THE WITNESS: Yes, I did.

THE COURT: Did the defendant's attorney object to the admissibility of this testimony?

THE WITNESS: I don't recall whether there was an objection.

The testimony was allowed. I did testify.

THE COURT: You don't recall whether it was objected to?

THE WITNESS: I recall there was quite a bit of discussion about it and there was an attempt, whether there was an actual objection, I don't know.

THE COURT: Do you know in any case where you testified and objection to the admissibility of an opinion on comparison photographs was overruled?

THE WITNESS: Yes, on appeal.

THE COURT: You remember a citation?

THE WITNESS: Yes. It's a case in Portland, Oregon. I have the -- I have it upstairs.

THE COURT: That's the Ninth Circuit.

Do you remember the volume or the case?

THE WITNESS: It was a case involving the subject named Carey. A Federal case. I believe I have a copy of the citation, if you would like I will get it.

THE COURT: Can you call upstairs?

Do you have a copy of the opinion or just the citation?

THE WITNESS: I believe it's the opinion. I believe I do.

THE COURT: If you can get it that might be helpful.

MR. COHEN: Is that U.S. Against Carens?

THE WITNESS: Yes.

MR. COHEN: 434 Fed. 2nd. 643.

THE WITNESS: It was a similar case to this.

MR. CLAREY: Apparently it's cited in the Law Review article.

MR. COHEN: It may very well be. I don't recall.

MR. CLAREY: May we begin?

MR. COHEN: I didn't get this from the Law Review article.

THE COURT: Did you give it to the writer of the Law Review article?

MR. COHEN: I did not.

THE COURT: You didn't write the Law Review article?

MR. COHEN: Your Honor, there are some people that doubt whether I can write my name.

BY MR. CLAREY:

Q What is your occupation?

A Special Agent of the FBI assigned to the FBI laboratory, Washington, D.C.

Q What do you do in the FBI laboratory?

A I am assigned to the document section. I am actually the night chief of the Special Photographic Unit of the document section, FBI level.

Q What is your job? Can you describe it for us?

A I make examinations of evidence including examinations of photographic items that are recovered as evidence and also examinations in addition to this.

Q For what purpose would you make these examinations?

A For the purpose of comparing items of evidence to determine whether there is any relationship between thes- of evidence or whether they can be -- whether they are

not related, and that sort of thing.

Q What are your qualifications for this type of work, starting with your educational qualifications?

A Well, I have a Bachelor of Science and Bachelor of Arts degrees from the Central Missouri University, in Warrensburg, Missouri, and also a Master of Arts degree from the University of Missouri. My background consisted of a major in physics and chemistry in my undergraduate work.

I taught school for six years teaching science and after that time I came to the FBI, and was assigned to the FBI laboratory.

Q How long have you been with the FBI laboratories?

A For approximately 32 years.

Q In that time, has your work been chiefly with photographic documents?

A I'd say for the -- well, I've worked with photographic documents during the entire period, but with a specialization in this field for the last 20 years.

Q Has that experience included comparing bank surviellance photos with actual photos of suspects?

A Yes. This kind of examination has increased and there has been more of it in the last few years.

Q Could you estimate how many such comparisons

you have made?

A It would be several hundred. I don't have any exact count.

Q That is over what period of time?

A During the 20 years.

Q Have you ever testified before concerning this type of comparison?

A Yes. I have testified and again, I don't remember the exact number, but approximately 30 times concerning this type of evidence.

Q That would be testifying the comparison of bank robbery surveillance photos with suspects and defendants in bank robbery cases?

A Yes, sir.

Q Have you been qualified as an expert in any courts?

A Yes, sir.

Q For what particular area have you been qualified as an expert?

A In the comparison of photographs, Courts here in Brooklyn --

Q Is this the Federal Court here in Brooklyn you're referring to?

A Yes, sir. Washington, D.C., Los Angeles.

Q Are these all Federal Courts?

A All Federal Courts, yes, sir.

Q Now, may -- has this exhibit been marked?

THE COURT: Exhibit 31.

Q Referring to Exhibits 31, and I have already indicated the stipulation, we don't have to go into that.

Did there come a time when you received the photographs shown on that exhibit?

A I received the film from which these Photographs were made, and these particular photographs were made then in the laboratory.

Q Now, which onces are you referring to, sir?

A These four at the top were made from the surveillance film.

Q Perhaps -- perhaps it would be better if you stepped down and used that easel. Would it be more comfortable?

MR. COHEN: Perhaps the photographs should be, although they are part of one exhibit should be numbered 1 through 7 or 8, so that the record could be clear in reference to them?

THE COURT: Yes. I think that Mr. Webb's report identifies each photograph by number or letter. I saw some reference to it in the report.

MR. COHEN: I think, your Honor, that those are evidence numbers like K numbers, or Q numbers, but what I'm suggesting is that for the purpose of his testimony here, we call them A, B, C, D, E, F, and G.

THE COURT: Let's find out what the report says first. Mr. Webb, does your report identify these by letters or numbers, or will your testimony refer to the photographs by letters or numbers?

THE WITNESS: I hadn't planned to do that. However, I could.

THE COURT: We can do it afresh, then. I thought it might interfere with the cross-examination, because your report may have had different letters or numbers.

THE WITNESS: The report hasn't referred to these specific photographs. It's merely referring to photographs, these are just representative of photographs from surveillance film, which is one item of evidence.

THE COURT: Would it be disfiguring in any way or interfere with your testimony if we su -let every photograph like 31A and put the tab on it at the bottom?

THE WITNESS: No, that's fine.

THE COURT: All right. We'll do it that way.

MR. COHEN: As long as the record is clear what he's referring to.

THE COURT: The entire exhibit will be called 31 for identification, and then start numbering, Mr. Clerk, horizontally, the one to my left is 31A and put it in the place that will in no way disfigure the photograph, and then the one beside it on the right, 31B, and then come down to the middle, 31C, D.

MR. COHEN: Your Honor, I'm correct, that is still only marked for identification, am I right?

THE COURT: Oh, yes. I will not mark anything in evidence outside the hearing of the Jury unless a basis is established before the jury.

MR. COHEN: It just slipped my mind.

THE COURT: You only made a concession. You said that the top photographs were surveillance and the bottom photographs were the photographs --

MR. COHEN: I just wanted to make sure I'm keeping track of it, your Honor.

THE CLERK: Seven photographs marked Government's Exhibits 31A through 31G, inclusive, for identification.

(So marked.)

MR. CLAREY: Your Honor, this roll has been marked. I just want to have the witness identify this.

Q Can you identify the roll of film?

THE COURT: You do not have to go through his entire examination, Mr. Clarey. You can do it before the jury. I want to know the basis for his opinion, whether there is in my opinion a rational basis whether the jury can consider it, that is all.

MR. CLAREY: I will ask three or four very quick questions.

Q Did you compare the photographs 31-A through 31-D with the photographs 31-E to 31-G, in other words, did you compare the top four with the bottom three?

A Yes, I did. I would like to point out that photographs 31-A and 31-C are made from the same frame of the film.

Q The film contained in this can?

A That is right. And 31-C is a further enlargement of one individual that is recorded in that frame.

THE COURT: You have isolated that individual from everything else around it.

THE WITNESS: Yes, sir, in 31-C.

Now, the same thing is true for another frame,

which is 31-B and 31-D. There are other frames but these are two frames that were selected from the total film that was available.

Q In other words, you compared other frames with those three bottom photographs; is that right?

A Yes.

Q What did your examination of those photographs consist of, what did you do physically?

A I made photographs from a set of negatives submitted to me, two negatives being represented by 31-E and 31-G and additional photograph 31-F and enlarged those so that the head sizes were approximately the same so that the comparison could be made and then making the comparison I looked to see what features were recorded in the bank surveillance film and whether these same features did or did not correspond in the known photographs that I had.

THE COURT: Is it similar to a fingerprint identification where you get a number of points of identification that are similar?

THE WITNESS: It is not similar to fingerprint identification because in a comparison of this kind you are limited by the bank surveyance film which never records or very seldom records that much detail so that you are limited by what you have to work

with. Now certain features do show and these are the things that are looked to for comparison as to whether they could or could not be the same. Of course, in a fingerprint you have a great deal more detail.

THE COURT: Do you look for unusual features in the individual?

THE WITNESS: Yes, and occasionally those are found. Now in those cases it is possible to arrive at a positive identification. In a case of this kind where you do not have unusual features, scars or marks, things of that kind, you cannot reach a positive identification. That is not my testimony. My testimony is that the features that do appear for this individual in the bank surveyance film also appear in these photographs of this individual and that it is either the same person or a person with these same features.

Now, these features, being the shape of a head, to begin with, can be seen here by -- particularly by the curve of the chin and the pointed nature of the chin. The lips are slightly protruding and thick, a light moustache here, the shape of the nose, the nose is smooth and straight. The nostrils do extend from the sides giving an overall distinctive triangular

shape to it. Then the eye can be seen under the glasses in this particular exhibit here, 31-C, as compared with the eye here, that is the eyebrow and the set of the eye in the head there and then the ear is the best detail that is recorded here. If you look closely the shape of the near part of the ear there is triangular at this point and can be seen as a shadow in the photograph and then the amount of ear from there to the edge is similar and the attachment of the ear to the head is very similar. These things are distinctive in an individual, particularly the ear lobe of individuals as well as the configuration of the ear itself are distinctive. This comes closest to being like a fingerprint.

THE COURT: So ears are shaped differently.

THE WITNESS: They are shaped differently. Each individual is different with respect to that and there are a lot of differences with respect to the size of the ear lobe which governs the manner in which it attaches to the head and so on.

In this case the ear lobe is not large at all, it goes over with just a little bit of an extension into the head and in both cases it is the same.

THE COURT: All right.

MR. COHN: May I, your Honor?

CROSS-EXAMINATION

BY MR. COHN:

Q Mr. Webb, is that not your name, Webb?

A Yes.

Q Mr. Webb, your college degrees and Masters were not in photography, were they?

A They were not, no.

Q They were not in this kind of identification, were they, you did not take courses in this during college or during your graduate work?

A My college work is in a scientific field which of course is a basis --

Q Physics and chemistry?

A Yes. And chemistry.

Q You do not have to wo[illegible]y about levers or chemical equations in this, do you?

A No.

Q And your Masters is what, in education?

A In the field of education with further work in physics, yes.

Q In other words, to be a physics teacher or science teacher?

A That is what I started out, as a physics

teacher.

Q By the way, is that a recognized science, this identification?

A It is a fairly new science I would say, which is brought on by the fact that in recent years more and more banks have protected themselves by or attempted to protect themselves by installation of cameras so that in years past we have not had this kind of film to work with so from that standpoint it is a fairly new science.

Now, it would also be related somewhat to photogrametry.

Q Photo- what is that?

A That is the study of aerial photography for purposes of measuring and detecting certain ground installations. You are probably familiar with the Cuban crisis where that kind of photography was used to locate missile installations in Cuba.

THE COURT: Does it have anything to do with making topographical surveys from the air?

THE WITNESS: It is I would say a branch. However, with this kind of photography you cannot get down to the definite measurements that you can with the other fields and is the reason I would hesitate to relate it too closely because here there

is no chance of really, unless you have the photographs made from exactly the same positions and everything equal. In aerial photography you tend to do that because of the great distance involved so you can make these measurements and come up with maps and such.

Q But in fact, sir, since you bring it up, the fact that photographs were made from possibly different angles, even slightly different lenses, different cameras, different kinds of film, all might make a difference in what you see in the comparison you make?

A Well, if the angles were too much different this would perhaps result in not being able to make the comparison.

Q Or it might make something different in shape, you might not know the angles were different, Mr. Webb, therefore you could not make a comparison and perhaps it might make the shape of something appear to be something other than what it was, is that right?

A I think you could tell whether the angle is different by looking at the photograph.

THE COURT: That might be important to me. How can you tell that the angle of the camera in the top four photographs -- and that would be 31-A, B, C,

and D, was at about the same angle as the photographs taken in the last two photographs, that would be 31-E and F?

THE WITNESS: In these photographs, 31-E and G --

(Continued on next page.)

THE COURT: Is the one to the right G?

THE CLERK: G, your Honor.

THE COURT: Then it is E and G.

THE WITNESS. E and G were after. I had indicated in the report it would be desirable to make photographs from approximately the same angle. It may not be exactly the same.

THE COURT: Can you as an expert tell from the photograph?

THE WITNESS: I can tell from the set of the head on the shoulders and things of that kind.

THE COURT: It was about the same?

THE WITNESS: Yes, the shadows that are there.

THE COURT: Enough to base an opinion on?

THE WITNESS: Yes.

MR. COHN: I think, your Honor, we are going to need the testimony from Agent Fox on that, who took the pictures, and I will accept the stipulation from Mr. Clarey as to how he got measurements at the bank.

MR. CLAREY: You were standing there when I did it.

MR. COHN: I was not in the bank.

MR. CLAREY: You were standing downstairs.

MR. COHN: I said I will accept the stipulation from you as to what measurements you got at the bank.

MR. CLAREY: Agent Murphy and I took measurements in the bank. We have Agent Murphy's notes in the bank which I will mark. And I measured, duplicating this down in the Marshal's Office downstairs in the hallway.

THE COURT: Mark what you are talking about.

THE CLERK: Marked Government Exhibit 3 for Identification, so marked.

MR. COHN: There are a number of things, discrepancies which were not intentional but which were unavoidable because of the condition we took the pictures under and that is part of the qualification here.

THE COURT: Was the ceiling height in both rooms in which the photograph was taken and at the bank the same or about the same?

MR. CLAREY: The ceiling height I do not know but we had Agent Fox climb up on a table and stand perilously, by the way, stand on three or four phone books and put his camera at a height of eight feet nine inches from the floor which is the exact height that Agent Murphy measured the bank camera.

THE COURT: How about the angle of the camera, how did you measure that?

MR. CLAREY: NOw, we measured the distance, we went to the bank and measured the distance out from the counter to here where we approximated Mr. Brown standing in the picture and that was six feet.

THE COURT: The perpetrator was standing.

MR. CLAREY: Yes, the perpetrator was standing.

MR. COHN: Thank you, your Honor.

MR. CLAREY: In the picture which was approximately six feet. We also measured the distance on a straight line from this point to the camera, on a straight line. That was fifteen and a half feet. So when I got downstairs in the hallway I took from where Mr. Fox was standing fifteen and a half feet out in the hallway and it turned out to be exactly six feet wide so we placed Mr. Brown fifteen and a half feet down from the camera, six feet across.

Mr. Fox was standing on a table with telephone books at this angle which is essentially I would say the same angle.

THE COURT: Mr. Cohn was present when that measurement was made?

MR. COHN: Right. Now I will relate a little

bit, if I may, your Honor.

Mr. Fox most assuredly tried to keep his camera lens at eight foot nine inches but being that he is not the great Fox, the circus performer, he was having great difficulty with his balance and the way they marked the eight foot nine inches they took a crayon or a grease pencil or something and they marked eight foot nine inches on the wall and he tried to keep his lens somewhere.

I noted his camera varied from near the mark and never getting exactly to it and somewhat below it.

THE COURT: How about the angle or the pitch?

MR. COHN: That is it, Mr. Clarey never measured the pitch, in the bank. I think that is fair to say. I asked you at the time and you said you did not.

MR. CLAREY: I do not believe we measured the pitch because the approximate angle that we took was this dotted line which is a line from the camera pointing down to an area in the general vicinity where Mr. Brown was standing -- the perpetrator was standing.

THE COURT: So it was taken on the line that is a triangle called the hypotenuse, I believe.

THE WITNESS: Yes.

MR. COHN: It is a cubistic concept.

THE COURT: That would be the hypotenuse of the triangle.

MR. COHN: Except, your Honor, and I think this makes a difference, that number one we do not know exactly where Mr. Brown was centered in both of these photographs so the angle can be different within the lens itself.

Number two, the second picture was taken, the comparison photograph was taken on a four by five camera with 135 millimeter lens.

I gather that the Mosler camera is a 35 millimeter camera. I do not have the foggiest notion what kind of lens it is. That may make a difference in terms of angles.

THE COURT: Will you stipulate the measurements as represented may be used for any examination of the bank on direct or cross-examination.

MR. COHN: I have no doubt those are measurements Mr. Clarey took.

THE COURT: Will you stipulate that the camera-man who took the bottom pictures took them at the angle that would be more or less on the line so it would be that angle.

MR. COHN: There may be a difference between eight foot six and eight foot nine.

MR. CLAREY: Why don't we ask the witness?

THE COURT: The witness probably cannot answer unless we understand what the agreements are and then if not, then Mr. Fox would have to come in and testify as to what happened and what angle he took it on and then Mr. Cohn would cross-examine him.

You see, except for the angle in the camera in the bank we have the measurements in the bank. Now, perhaps you may have to go in and make a calculation on the angle there and the angle here.

MR. COHN: I do not know how you can do it any more.

THE COURT: Based on Mr. Fox's testimony.

MR. COHN: The problem was Mr. Fox for good and all was wavering up and down.

THE COURT: For Mr. Webb's testimony I have to know how accurate these measurements are. If Mr. Webb, for example, tells me that he is assuming, for example, that I am probably two or three feet above you at eye level with the level of your head and taking a picture I have not measured precisely the interior angle of that triangle and now, if Mr. Webb says well, without knowing what the interior angle is, 33 degrees or 52 degrees, I cannot express an opinion, I could not take his testimony.

MR. COHN: That is exactly it.

THE COURT: But if he says to me, assuming that you tell me that you would be ready to stipulate to and give me the variations, that they are so, that he can express an opinion, then I will take it.

MR. COHN: Then I think your Honor, for him to do that, he would have to be qualified in the area of lens and photography as well.

THE COURT: I do not know whether that is so. How many courts have you testified in?

THE WITNESS: Some 30, your Honor, in this type of evidence.

THE COURT: Thirty times and under Kahn's 434 Fed. 643 page 644, I must say from the argument made there, the testimony of the expert would preempt the jurors right to decide the issue and that is what they dealt with, not whether the testimony was admissible.

They nevertheless say, "We see no error in the admission of this testimony."

MR. COHN: We do not know whether the trial record will reflect this kind of opposition.

THE COURT: We do not and that is why I think you should establish a basis for what the angle was there and what the angle was here.

How important is your knowing the precise interior angle of that triangle we referred to?

(continued next page.)

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THE WITNESS: I would say in a comparison of this kind I very seldom have it duplicated with this degree of accuracy even. In many instances of comparison it is necessary to make comparisons from photographs which are not actually made for the purpose and sometimes the features that are represented by that, by those photographs, can be interpreted as being consistent or not consistent.

THE COURT: That answers my question. I can only suggest to the Government to complete the record to offer the proof. I do not think I will require it in the light of Mr. Webb's statement. You say you can examine photographs made at two different times and know and neither photograph could be prearranged.

THE WITNESS: That is right.

THE COURT: And with measurements and with precision or any degree of precision and you say you nevertheless can make a comparison.

THE WITNESS: Make a comparison.

THE COURT: And express an opinion on identification.

THE WITNESS: Yes, Sir.

MR. COHN: Your Honor, that seems not to be a

science but crystal ball gazing.

THE COURT: It may be, but you see if you read enough about expert opinion you will find in enough reading that there comes a time when it is difficult to draw a line between an opinion of an expert and pure speculation of an expert. I might say from what Mr. Webb has told me this would fall into a traditional classification of expert opinion. I have listened to what you might consider as extremely speculative testimony that is admitted. Most of it is considered to be for credibility questions, weight questions and you may argue all this to the jury. I am only determining the question of admissibility.

MR. COHN: May I continue at least on qualifications?

THE COURT: Surely.

Q Is there any professional society of people who do what you do?

A Well, I do not think there is any society of people who do this specific thing. There are organizations that are related, forensic societies, forensic photograph, scientific photography.

Q Are you a member of an organization that does forensic photography?

A Yes I am.

Q You know about photography?

A Yes.

Q Well about this, there is no organization of people who do this kind of comparison, for want of a better word?

A There is a society of photogramic scientists or something of that kind, I forget the exact name of it.

Q You are not a member of that?

A I am not a member of that group.

Q Let me ask you, Sir, if I may, how many people do you estimate are doing this in the country at this time?

A I do not think there are very many.

Q Three, two, ten, one hundred?

A We have three in our laboratory and I frankly do not know of any other.

Q So that this science depends on three people, possibly four people that was mentioned in Fernandez -- I do not know what he had -- but as far as you know there are just three people in the country who do this science, is that right?

A It has been created by a need and we simply in our laboratory faced up to the need and are doing it.

Q Mr. Webb, that is always the case in science, there is always a need but whether or not it is admissible in a court depends on the state of the art.

A I am not going to rule on that.

Q No, you are not. Perhaps it was not intended for you.

MR. CLAREY: The jury is not here.

MR. COHN: But the Judge is going to rule on this.

Q Mr. Webb, it is rare, is it not in fact almost never can you say with certainty that two people on a comparison photo are the same person, right?

A It is rare that they are the same?

Q It is rare you say they are the same after comparison with certainty.

A You mean without --

MR. COHN: I will rephrase it.

THE COURT: The question is with a reasonable degree of certainty, not absolute certainty.

THE WITNESS: I would relate that to say my testimony during the past year and a half which has been in I would say 15 courts and just trying to recall from memory at least three or four of these were positive, what I would determine as positive

identifications. There have been other positive identifications which I have made during the past year and a half which have not even gone to trial, which I have not had to testify to. I am talking about ones I testified to.

Q When you say positive identification you mean the kind of report you gave here where you say it looks like him or you say it is him?

A It is him without any qualification at all, which I described earlier as requiring the detail in the bank surveillance film which would record scars, marks and things of that kind. As I described, very seldom in those films do you get that detail so that the thing that you are working with keeps you from making a positive identification to begin with, no way to do it.

Q At the risk of getting into the area of cross-examination which I will try not to do, your Honor, you did say that you are fairly knowledgeable in photography, is that right?

A Yes.

Q One of the things you told the Court in response to Mr. Clarey's question was that the shape of the jaw had something to do with your identification, the shape of the nose, the shape of the lips and they were consistent,

5a

you said, with this man but not exclusively and there could have been some other fellow?

A Yes, Sir.

(continued next page)

FK
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follows

Q In fact, what you generally described except for the ear was generally Negroid features at the risk of being a racist -- me, not you?

A I do not think so.

Q You do not think so? You mean the thick protruding lips are not characteristic of a lot of Black people?

A Well, to some extent that particular characteristic may be, that is only one.

Q What about the nose, that shape of nose, the broad nose?

A No, certainly not.

Q Well, sir, since we are talking about shapes, is it not true that different kinds of lenses cause or may cause different kinds of distortions in a photograph, may make something broader, flatter, wider, taller, shorter, some particular feature depending on the focal point in the defect of the lens or kind of lens? Do you understand that question?

A Defect on the lens.

Q Well of different kinds of lenses? Do you understand that question? Well, I am not sure I do.

Let me rephrase it.

For instance, an acromatic lens might do one

thing to a picture and a rapid rectolinear lens may do something different, might do another thing to a picture in terms of distortions in the film you get, right?

A Lenses are made with different kinds of glass to correct the different color or wave lengths of light and ordinarily lenses today are made with a great deal of accuracy to correct variations in the wave lengths of the light and for other purposes.

THE COURT: I do not think I am going to permit you any further inquiry here. You are certainly getting into cross-examination and I am satisfied that this testimony is admissible.

MR. CLAREY: Your Honor, the only matter is the matter of the other exhibit concerning height.

THE COURT: Is this witness going to testify to height?

MR. CLAREY: That is correct, your Honor.

THE COURT: For the same reason I will allow it.

MR. CLAREY: Agent Murphy again measured the height of the door in the bank and the height was seven feet. He measured the counter in the bank and the height was forty-eight inches and distance from the floor --

THE COURT: The height of the camera?

MR. CLAREY: The counter.

THE COURT: The counter.

MR. CLAREY: The counter in the bank, forty-eight inches.

THE COURT: He did not use that height, just the door.

MR. CLAREY: How about the door handles, did you use that?

THE WITNESS: No.

MR. CLAREY: We are only concerned with the seven feet height of the door.

THE WITNESS: That is right.

THE COURT: Do you agree the door is seven feet in height?

MR. COHN: If Mr. Clarey measuredit himself or said his agent did I accept it. I did not measure it, I do not know.

THE COURT: Do you make that representation?

MR. CLAREY: I was there when Agent Murphy measured it, yes, I can say it was seven feet. Agent Murphy can testify it was seven feet.

THE COURT: All right, let Agent Murphy testify.

MR. COHN: Swear him in place and let him say so.

J A M E S F. M U R P H Y, Special Agent, Federal Bureau of Investigation, having been duly sworn, testified as follows:

THE COURT: There is a door shown in 31A and 31B. Did you measure the height of that door?

THE WITNESS: Yes, I did.

THE COURT: Was that in the presence of Mr. Clarey?

THE WITNESS: Yes, it was.

THE COURT: What did you measure the height to be?

THE WITNESS: Seven foot-

MR. COHN: There is no question.

THE COURT: Then I say that it is established that the door is seven feet high.

(continued next page)

(Outside the presence of the jury.)

MR. CLAREY: Your Honor, I will have these marked while the jury is coming back.

THE CLERK: Three photographs on a card marked Government's Exhibits 33, 33A and 33B for identification.

THE COURT: After the jury is seated --

MR. CLAREY: 33 or 32?

THE CLERK: 32 is that diagram.

MR. COHN: Okay.

MR. CLAREY: When the jury first comes out should I take care of the stipulation first?

THE COURT: Yes.

THE CLERK: A photograph attached to a white blotter --

THE COURT: I prefer Mr. Cohn recite the stipulation if he remembers all the information.

MR. COHN: Mr. Clarey can recite it.

MR. CLAREY: A stipulation of testimony or stipulation of facts?

MR. COHN: Stipulation of facts.

Since I am in such an accommodating mood, your Honor, may I have a recess for personal reasons?

THE COURT: Yes, we will take a short recess.

THE CLERK: Photograph attached to a white

blotter marked Government's Exhibit 34 for identification.

(Recess taken.)

THE COURT: Seat the jury.

(The jury is in the jury box.)

DIRECT EXAMINATION

BY MR. CLAREY:

Q Will you repeat your name?

A Frederick E. Webb.

Q What is your occupation?

A Special Agent of the FBI assigned to the FBI Laboratory in Washington, D.C.

Q What are your duties in the FBI Laboratory?

A I am assigned to the document section as a unit chief of the Special Photographic Unit and I make examinations of photographic items of evidence in addition to making examinations of documents.

Q Sir, what are your educational qualifications?

A I attended Central Missouri State College, it is the university now, Warrenburg, Missouri, received a Bachlor of Arts and Bachelor of Science degree, and also attended the University of Missouri and received a Master's of Arts degree.

My undergraduate study I had a major in physics and chemistry. In my Master's study I worked in

the field of education with a minor in physics.

Q How long have you been with the FBI?

A For approximately thirty-two years.

Q How long have you been doing this special photograph work with the FBI?

A I was originally trained as a document examiner and was assigned to this particular field involving photographic evidence approximately twenty years ago.

Q Sir, does that photographic work that you -- does that photographic work which you do include subjects shown in bankrobbery surveillance photographs in comparison with actual photos of subjects?

A This is one part of it, yes.

Q For how long have you been doing that type of comparison?

A For approximately twenty years.

Q Can you estimate approximately how many specific such comparisons you have done, comparing surveillance bankrobbery photographs with known photographs?

A It would be several hundred. Perhaps even several thousand after you included individual photographs involved. But at least several hundred cases.

Q Have you ever testified in Court concerning the result of your comparisons?

A Yes.

Q Can you estimate on how many occasions?

A I would estimate about thirty times.

Q And what types of courts, sir?

A With respect to this kind of evidence, I think always it has been in federal courts.

Q Federal courts throughout the country?

A Yes. In this district as well as Washington, D.C., Los Angeles, California, and as well as other isolated areas.

Q Have you ever been qualified as an expert to testify as to such comparisons in court?

MR. COHN: Objection.

THE COURT: Overruled. I will allow it.

Q Shall I ask the question again?

A I am sorry, I didn't understand the ruling.

Each time I was qualified as an expert in each case.

MR. CLAREY: At this point, may it be stipulated --

THE COURT: First, I find the witness qualified to express an opinion on the photograph comparisons and express an opinion as to identification.

Now, my finding doesn't bind you at all. I

just make a preliminary finding to determine whether it may come before you. The weight it should be given and whether you consider Mr. Webb an expert in the field is solely for you.

MR. COHN: In light of that ruling, I was going to ask for a voir dire on qualifications, but I will reserve that voir dire for my cross-examination if you desire.

THE COURT: In the light of the testimony outside of the hearing of the jury, I am making my finding before the jury based on what I hear here. Everything you have may be reserved for cross-examination.

MR. COHN: I don't want to waive any voir dire as to his qualifications as an expert, your Honor.

THE COURT: Yes.

MR. CLAREY: The defense and prosecution have agreed to enter into a stipulation. First, that the top four photographs which are marked Exhibit 31A through 31D --

THE COURT: You may be in the way when you are pointing them out.

MR. CLAREY: Perhaps I will use this (indicating).

These are photographs made from this reel of film which was taken on January 10, 1972, on the morning there of in the Bankers Trust Company at 896 DeKalb Avenue.

THE COURT: In pointing to this exhibit or any other exhibit that isn't in direct view, feel free to swivel on the swivel chair or get up. In the event you find it difficult I will try to move it to another location.

Go ahead.

MR. CLAREY: And those bottom three photographs are photographs taken subsequent to January 10, 1972, of the defendant in this courtroom, Henry Stuart Brown.

And further that the distances and conditions for the taking of 31E and 31G were made in an attempt to duplicate distances measured in the actual bank.

More specifically, the distance from the teller's counter to where the subject -- which has been designated subject No. 1 is standing is six feet and the distance from that point to a wall on which a surveillance camera is located, the distance to the surveillance camera is fifteen and a half feet, and in taking the two photographs, 31E and 31G, those

distances were duplicated.

The subject, the defendant Henry Stuart Brown, was placed at a point from the camera fifteen feet down and six feet across a hallway.

THE COURT: In other words, the defendant concedes that he posed for the two pictures on the bottom?

MR. COHN: He does indeed so stipulate.

THE COURT: All right.

MR. CLAREY: And further that the height of the camera in the bank measures eight feet nine inches and that the photographer for 31E and G stood on a table and duplicated as much as possible that height by holding his camera as close to the height as possible of eight feet nine inches marked on the wall.

THE COURT: The defendant does not concede that the two posed pictures on the bottom were taken at precisely the same height or precisely the same angle?

MR. COHN: That is correct.

Q Did there come a time when you received the contents of Exhibit 3A for identification?

A Yes, sir, I did.

Q What, if anything, did you do with that? I take it it is a negative?

A Yes. This is a negative 35 millimeter sequence film and sequence exposure and the film was searched for frames that showed the subject or recorded the subject in the film and particular films were selected for additional detailed study.

Q For reference, we are referring to Exhibit 31 -- if it isn't in evidence I would like to have it in evidence.

MR. COHN: I have no objection.

THE COURT: Let it be marked.

MR. COHN: Except for the objection stated earlier.

THE COURT: You reserve the objection already noted.

THE CLERK: 31, 31A through 31G previously marked for identification is now marked in evidence.

(So marked.)

Q With relation to that exhibit, are the pictures in that exhibit related to the film in the can?

A Yes, sir. 31A is an enlargement from one exposure or one film, and 31C is a further enlargement from the same exposure or film of that particular individual here.

Q The individual carrying the bag?

A Yes. The shopping bag wearing the knitted cap.

Q 31B is an enlargement made from another frame or another exposure on the same film and 31D is a further enlargement from that same film of this same individual?

A This (indicating) masks out the rest of the exposure and enlarging that particular individual further, they actually represent two of the frames of the film. Two of the exposures.

Q Did there come a time when you received the photographs on the bottom of the exhibit, 31E, F and G?

A Yes, I did.

Q Did you do anything with relation to all of those photographs?

A I took the negatives which I received of these photographs.

Q Which are you --

A 31E and G, and enlarged them so that the head size would be approximately the same as the head size which I enlarged, 31C and D, so they could be compared and also took a photograph 31F and enlarged that head size to the same approximate size so they would be comparable.

Q Did you do anything after you did that particular enlargement?

A I then made my comparisons.

MP:bd
AM Take 42
Reel 2

Q What did you do to make a comparison?

A I looked at the features recorded in the bank surveillance film, these two frames, as well as others, where this individual was shown.

Q Did you look at them with the naked eye?

A In enlarging them in a print I was able to look at them with the naked eye. It would be in effect looking at them under a microscope. Originally we used a microscope and enlargements were made after that.

Q Continue.

A Then, I noted the features that were recorded in the bank's surveillance films and made a comparison of the features of the photographs I had available to me.

Q What was the result of that comparison?

A I found certain features that were consistent.

Q If you would like to move the exhibit in any way, you may.

Is there anyone that can't --

THE COURT: It might be better if you brought it right out here. (Indicating.)

Mr. Brown and I would have to move.

MR. CLAREY: Someplace where the jurors are able to see it.

THE COURT: Suppose you put it here then

(indicating). Maybe this might be better.

Maybe the two jurors here could stand for a while at the end of the jury box. See if you can turn it a little more towards -- all right.

Q Continue.

A The features which I found, first the features recorded in the various exposures in the bank's surveillance film were limiting factors in the comparisons, but I found that the shape of the head which is shown here in particular by the curve of the chin and pointed or almost pointed nature of the chin was consistent in the comparison of these photographs (indicating). The lips, in size, in protrusion, and thickness were consistent in comparing the photographs. The protrusion is shown a little more in the photograph here, 31C, from the bank surveillance film as compared with 31E. On the upper lip was a light moustache which was also present -- that is shown in the bank surveillance films -- 31C and D, and also shown in all three of these, 31E, F, and G. The nose was smooth, rather the nostrils were protruding. That was true -- that is in the bank surveillance photographs 31C and D, and also that same character I found to be present in 31E, and G as well as 31F to the extent that the general impression of a triangular shape as you get in the photographs of the nose was consistent.

The eye shows in 31C where the head is turned slightly to the right and underneath the glasses on the left side the eyebrow and the set of the eye was found to be similar or consistent.

Then the ear was as much of it as recorded in the photograph of the bank surveillance films, 31C and D, the inner part of the ear comes down to a "V" shape here and this was also true of the photograph, the one I pointed to originally, 31D from the bank surveillance film, and 31G, that same triangular shape within the ear.

The amount of flesh from there to the edge of the ear was similar as well as the manner in which the ear is attached to the head. And this can better be seen in 31C as compared with 31E. Particularly with respect to the thickness of the ear here, this shadow area here to the edge and attached to the head with just a very small extension or slit extending below the point where it attaches. There being very little ear lobes at all in the ear. And this ear is considerable with such characteristics -- based on these features being confined what was of course recorded in the bank surveillance film -- my determination or conclusion was that these photographs were all consistent and that these are either photographs of the same person or a person of the same features.

Q Directing your attention to the ears specifically, is there something about ears which distinguishes them from other facial or head features?

A Ears in different people do vary quite widely with respect to the configuration of the ear which includes the attachment of the ear to the head and such things as that.

There is a great deal of variation between individuals with respect to this particular characteristic. Size of the ear and so on.

Q Did that contribute to your opinion?

A Yes sir, it did.

Q Would it be possible for two people to have -- two different people to have the same ear characteristics?

A Well, if you go into greater details I don't think it would be possible for them to have identical characteristics. These characteristics here are not that detailed however.

(continued next page)

Brown
saml mm/nc

DIRECT EXAMINATION

BY MR. CLAREY: (Cont.)

Q Perhaps we can move that exhibit aside for a moment.

THE COURT: Is the witness going to use photographs? Shall I ask the jurors to take their seat?

MR. CLAREY: Yes.

Perhaps we can do this from the witness stand.

Q Will you be able to do it from the witness stand?

A Yes.

MR. COHN: May we have a side bar, briefly?

(Discussion at the side bar out of the hearing of the jury as follows:)

THE COURT: First I keep remembering and forgetting that you wanted to walk your man before the jury, so right after he gets through --

MR. COHN: That will be an appropriate time.

THE COURT: Whenever you want to. Do you want it then?

MR. COHN: It doesn't make any difference. It may be my recollection, I just wanted to make

sure. Mr. Clarey asked if certain things went into making up the witness' opinion and I don't recollect him ever asking an opinion with reasonable certainty whether or not the person on the top --

MR. CLAREY: He just stated his opinion.

THE COURT: Maybe I missed it, too.

I thought you were waiting until he is all through.

MR. COHN: He is all through with that area.

MR. CLAREY: He is not going to say in his opinion it is the exact same person, he said it is a person with identical characteristics.

MR. COHN: I think he is obligated to ask it.

THE COURT: Can you express an opinion with a reasonable degree of certainty whether the individual in 31A, B,C and D is the same as E, F and G?

MR. CLAREY: I will be glad to ask him.

(In open court.)

BY MR. CLAREY:

Q Can you express an opinion with any reasonable certainty as to whether the individual shown in the bank surveillance photograph is the individual shown in the bottom three photographs?

MR. COHN: Objection to the form.

THE COURT: Sustained.

Mr. Webb, can you express an opinion with a reasonable degree of certainty as to whether the individual in the photograph 31A, B, C and D is the same as that in E, F and G?

THE WITNESS: I think my opinion is within that --

THE COURT: Can you?

THE WITNESS: Yes.

THE COURT: What is your opinion?

THE WITNESS: That the individual recorded in the bank surveillance film, represented by these two exposures, 31C and D, is the person recorded in the film or the photographs, 31E, F and G, or an individual with the same features that are recorded in those bank surveillance films, those bank sur- surveillance exposures.

BY MR. CLAREY:

Q Can you identify Government's Exhibit 33 and 34 for identification, Mr. Webb?

A Yes, sir.

33, this is 33 and 33A and 33B, reading from left to right as you look at this exhibit, are also additional enlargements made of the same individual from the

bank surveillance film as represented by 31C and 31D, who is carrying a shopping bag --

MR. COHN: If that's being shown to the jury and it looks like it is, I'd like to see, too. I know it's difficult. May I move all the way over to the corner?

THE COURT: I suppose you do that.

MR. COHN: Can you do it that way?

THE WITNESS: Yes, this is fine.

I didn't mean --

MR. COHN: I ascribe no bad motive to that.

BY MR. CLAREY:

Q Can you identify the other exhibit?

A This, Exhibit 34 simply represents an exhibit which-- from which I could testify to a method of estimating the height of the individual that I have been testifying concerning from the bank surveillance film.

MR. CLAREY: At this point the defendant's attorney and the Government stipulate that the height of the door of the entrance to the bank which is shown in 34 and in all if the pictures in 33 is seven feet from floor to the bottom of the door sill.

THE COURT: The door frame.

MR. CLAREY: The door frame over the door. And further that the pictures in 33 and 34 are taken from the surveillance film of the bank robbery from Bankers Trust Company, January 10, 1972 taken at the Bankers Trust Company at 896 DeKalb Avenue, Brooklyn on the morning of January 10, 1972.

MR. COHN: So stipulated.

BY MR. CLAREY:

Q All right, now, Mr. Webb, --

MR. CLAREY: At this time I offer those exhibits into evidence.

THE COURT: Any objection?

MR. COHN: I haven't seen 34 and all those lines and charts and arrows, whatever that is.

THE COURT: The witness didn't testify to the markings on the photograph.

MR. COHN: In deference to the foreman of the jury who is an engineer and might understand these things, I would like to hear what these things mean before we accept this.

I have no objection to 33A through C.

(continued next page)

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THE CLERK: Government's Exhibit 33 to 33B previously marked for identification marked in evidence.

(So marked.)

Q I'd ask the witness to explain Government's Exhibit 34.

A Exhibit 34 are notes which simply demonstrate a method of estimating the height of this individual who is moving through the door and the known quantity is the height of the door, and so -- should I hold this up?

THE COURT: Well, just answer the questions that Mr. Clarey is asking.

THE WITNESS: Well, these are simply figures made from this chart which was produced in this way. Lines which were known to be parellel, were extended from the photograph to a point where those two lines intersected.

Now, the distance here between the lines, the perpendicular distance would be 7 feet between those two lines.

Then a line from the top of the individual moving through the door was extended to that same point. The angles of those two -- of those lines, then, would be in the same ratio as the total

height of a perpendicular as compared with the height of the individual and that is all these figures show, an attempt to estimate the height. It's an estimate.

Q Would you explain your -- the figures which are written on there?

THE COURT: How did you make your calculations? What were the angles?

THE WITNESS: The angles were measured and the large angle was determined to be 31 and 700 degrees with the protractor and the smaller angle was 26 and 5/10 and I first arrived at a computation on the basis of precentage that the larger of the two angles, then, that I was working with, was 83 and 4600's per --

THE COURT: Well, a protractor is a measurement of angles.

THE WITNESS: A means of measuring angles.

THE COURT: You start out with nothing so to -- the sum total of all angles is 180 degrees.

THE WITNESS: That's right.

THE COURT: You know the angle at the top is 90, a right angle.

THE WITNESS: Yes.

THE COURT: So that whatever -- you -- what you have to determine is how to apportion the other degrees.

MR. CLAREY: Perhaps it would be easier to use the easel.

MR. COHEN: For the purpose of this explanation I would let him pose this exhibit so that he could state these angles, somehow I flunked intermediate algebra and I need to follow it.

THE COURT: Would you be good enough to take the position at the end of the jury box, the alternate jurors, so that you can see the exhibit.

THE WITNESS: I simply took the photograph, the same copy, it's marked here 33, and it's another copy to the same enlargement and extended it, a line along, which would have been along the floor to a point and then a line parallel with the top of the door to that, where they interjected and inserted a straight line above the head of the individual walking through the door here, and the relationshipbetween these two angles would be the same as the relationship between a vertical distance from here to the top of the head, and the total height of the door.

So that you come up with the proportion that an angle, this smaller angle is 26.5 degrees, 26.5 is to the unknown height of the individual as the other angle, 31.75, is to the total height of the door which is 84 inches or 7 feet and then simply multiplying making a division here, what the -- what it actually worked out to be is 31.75 X, equals 26.5 times 84, and that gives us 22,260.

Then solving for X, 22,260 divided by 31.75, equals 70.10 inches and in my report I -- since the feet are spread apart here, and with the little experimentation I found you would have to add at least two inches to that so I reported that this individual was approximately 6 feet tall.

Now, I didn't make any attempt to say that was an accurate measurement, but it was an estimate.

(Continued on the next page.)

THE COURT: Do you have an opinion as to what the variation might be?

THE WITNESS: Well, I would say that it could vary one inch one way or the other and this may depend on the hair, the cap and other things of that kind as well as the inaccuracies which might occur as to the point you selected in making this measurement.

The feet being spread apart would make a little different in the total height that the man would appear in the photograph.

As compared to the usual method of measuring a man with his two feet together and standing straight back to the wall or something of that kind, it is that way, but he is in the neighborhood of six feet.

THE COURT: Do I understand that you can express an opinion with a reasonable degree of certainty that he is between 5'11" and 6'1"?

THE WITNESS: Yes, sir, that would be my way of putting it, yes, sir.

MR. CLAREY: No further questions.

CROSS-EXAMINATION

BY MR. COHN:

MR. COHN: Is Exhibit 34 in Evidence?

MR. CLAREY: I offer it in evidence, and in fact it is in evidence.

THE COURT: Any objection to it?

MR. COHN: No, not really. I don't understand it, but I really don't have any objection.

THE COURT: If you have any objection to it I will instruct the jury that only the photograph may be admitted and all the calculations may be just to refresh the recollection but the calculations are not part of the record and the testimony of Mr. Webb is what they consider.

The calculations are only there to recall what Mr. Webb said about it. If there is no objection, I will say the entire exhibit is in.

THE CLERK: Government's Exhibit 34 previously marked for Identification now marked in Evidence.

THE COURT: Do you want to examine on that?

Shall I continue to ask the Alternate Jurors to continue standing behind the jury box?

MR. COHN: I am going to examine on all the pictures and I have these ladies stand forever.

THE COURT: Well, move the chairs up in front of the jury box.

(Continued on next page.)

BY MR. COHN:

Q Let us start with Exhibit 34. I take it, sir, that there is a provable theorem that what you have done will result in a correct mean proportion between the angle, between the portions of the arc taken at the narrowing of the angle and the arc at the fore-end of the angle.

Is that fair to say?

A The angle is all the same.

Q But there are distances involved?

A Yes.

Q And I take it, sir, that on top of flunking algebra I flunked Euclid --

MR. CLAREY: Perhaps we can talk about Mr. Cohn's school record at another time.

THE COURT: Please disregard that.

I think it is important that if Mr. Cohn uses algebraic or geometric terms that you take a little time and explain it to me in layman's language.

MR. COHN: Let me try to back track.

I probably used them incorrectly in any event.

Q You have used the method, have you not, trying to reduce it to its simplest terms, of extending two straight lines along an estimated angle; is that right, until they meet?

A The angle is not so much estimated as perhaps the -- it is necessary to perhaps estimate the point of origina, but I selected a point as best you could from the photograph. Once doing that, then the angle would be in the same proportion as the -- as a perpendicular would be from here to here (indicating).

Now, these lines extended here in ordinary life are parallel but in the photograph because of the position of the camera or an observer at that point, those lines seem to go together.

Q You are talking about perspective problem?

A That is right.

Q Now, what I am trying to ascertain, sir, to start with is the way you have explained it, I don't know why you just couldn't pick any two points and draw a line.

You say you did not estimate. You tried the best you could to find the right angle but if you hadn't found the right angle it wouldn't have made any difference?

A It might make a slight difference and that is the reason there is a chance for an error and that is the reason why I called it strictly an estimate.

Now, another method would be, and I don't believe it would be quite as accurate, would be to drop a line straight down through this person and you have the same relationship

then, a little more arrived at in a little simpler manner with respect to mathematics, that his height here is in proportion to the measurement on this photograph from here to here (indicating) as this distance is to the actual distance measured in the bank which is what you would have, seven feet, and you could arrive at it that way.

As a matter of fact, I tried it by that method also and I came up with practically the same result.

Q Practically? How different was it?

A A matter of tenths of an inch.

Q So that what you are saying is that the 71 to 73 possible variant here, right, is a possible computation error?

I should not use computational but measurement error?

A There is an error of perhaps -- particularly with respect to this top line -- a selecting of the point from which it starts and I don't think there is any error to speak of with respect to this line.

Q What you are saying is the two inches of possible variance that you are talking about are because you cannot with preciseness measure this angle or that angle?

A With photographs of this kind, that is right.

Q So there you have two inches.

Now, you also mentioned on your direct that the

person's feet are spread apart?

A Yes.

Q He is walking?

A Yes.

Q And in fact would it not be fair to say that the distance the feet are spread apart in that picture, that one would assume he was walking in a rather hurry?

A I don't think so. I don't know what the rate of the camera is, but you have three photographs and he is all going through the door and I don't know how big a hurry he is in.

Here this photograph is recorded, 33-A, and his foot is, that is his right foot, is forward, his forward foot is just coming down and it is in motion and 33, his foot is now down and that is the only difference. These are sequence photographs.

Q All right.

In 34 which looks pretty much like the same picture that 33 is--

A Yes.

Q (Continuing) -- his feet seem to be spread fairly wide apart; is that right?

A Well, they are the distance of this threshhold plus whatever you estimate this to be, six or seven inches

here.

Q Now, from that picture, sir -- withdrawn.

You are saying that on top of that variant that you might have had because of the estimate, the method of estimating that you had to use, there may be a variant because his legs were apart and not together.

When we were measured in school we stood up straight, do you remember?

A I explained that as being what I used to obtain my estimate and I experimented with a stance of that sort and I used myself and I had a measurement made and I found this did make at least a difference of two inches in my height or perhaps a little more.

Q That made a difference in your height and also the possibility of a computational error -- well, I don't mean a computational error, but the measurement method, there is a possibility there?

A I added two inches.

Q I am not asking you that. I am telling you what my question is, and am I right or wrong: On top of the possible error that you made or that you might have made because of the method you have taken of estimating from that picture there is also the possibility of error because of the stance that the person in the film made?

A Yes, sir, I described that.

Q Thank you.

Now, when you experimented with yourself to find out what the variation might be because of that stance did you do it with your feet bent or with your knees straight?

A My legs were pretty well straight.

Q Can you tell from that picture whether or not that person's knees are not straight or somewhat bent?

A This leg is straight and it is at an angle but his weight is on this leg. His weight is just in the process of being transferred to the forward leg here.

This foot can be seen in this photograph as being on the move and not on the pavement yet, so that my interpretation was that this leg was straight and that is the way I arrived at my -- that is the way I performed my experiment.

Q That person is clearly walking?

A He is walking.

Q That might make a difference in the measurement, too, right?

A I don't know how.

Q Then it is wrong? It would not?

A I don't think so.

Q Or don't you know?

A It would make a difference with respect to the

fact that with his legs spread he wouldn't be as high in the air as he would with his legs together.

Q Don't some people sink down a little way when they walk? You have noticed, you can recognize --

MR. CLAREY: I object.

Can we have a question rather than four of them?

THE COURT: Sustained. Please rephrase it.

Q Have you noticed in observing people that their walks are sometimes distinctive?

A Yes.

Q Some persons lean into a step and some lean back and some lean to the side?

A Yes.

Q That might make a difference, might it not, because of the manner in which a person walks, in how tall he appears at the particular time he is taking a step? Right?

A Yes, it would.

Q Now, may I see Exhibit 30-A and B or 31?

THE COURT: 31.

MR. COHN: 31.

Q Can we put this up on the easel?

THE COURT: Would you do that, Mr. Clerk?

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Q Now, sir, these pictures were taken from -- withdrawn.

You have received some training in photo identification, I guess we can call it, from the FBI, right?

A Yes.

Q And you have been practicing this art or science for some 20 years, did you say?

A Yes, sir.

Q Before you joined the FBI, you were a school teacher, is that right?

A Yes, sir.

Q Science of physics?

A Physics.

Q But your preparation for being a school teacher or being a physicist was not particularly directed towards this kind of work?

A Not for this specific work, no, sir.

Q You may have learned the scientific method but for photo identification it did not help, I mean it was not directed toward that?

A I think it is a good background for it.

Q So all the training you received in this area has been while you were at the Bureau, is that right?

A Yes, sir.

Q Is this art one of very lengthly history?

A Well, I think if you start with the history of it, you would have to go back to the beginning of photography, if you actually studied the history of it.

Q How long have people been actually using this kind of procedure where you identify a person from one photo into another photo?

A I would say since about 1839.

Q Since 1839?

A Yes, sir.

Q And have a lot of people done it over that period of time?

A Commonly used in law enforcement work ever since the inception of photography.

Q Comparison of photographs?

A Yes.

Q And how long has the Bureau been doing it and using that evidence to bring to Court?

A I would suspect since the beginning of the Bureau but not from the point of expert testimony perhaps but this kind of testimony is simply an extension of a common practice of comparing photographs.

Q Well, sir, how many people are there in the country to your knowledge, who do this kind of work?

A I do not know of any others than those we have in our laboratories. We have three.

Q Including yourself?

A Yes, sir.

Q And in the whole United States you do not know of any others?

A No, I do not really that have testified in Court, I do not.

THE COURT: Is the question directed to the number that have testified or the number?

Q No, numbers that are doing photo identification of forensic purposes.

THE COURT: Are you talking about a comparison photography or any other kind of photography?

MR. COHN: No comparison photography work.

THE COURT: Specifically the method used by Mr. Webb. You understand the question now?

THE WITNESS: I think he is talking about making photographic comparisons of individuals recorded in photographs with other photographs recorded of individuals.

THE COURT: Is that the question.

MR. COHN: That is the question.

THE COURT: Are you asking those that do the work or those that come in that testify?

Q Those who are expert in the field and are

working in the field.

A Well, I answered that by saying that the only ones I know of and there may be others --

Q But you do not know of them?

A I do not know of them. We have three in the laboratory, in our FBI laboratory.

Q Are there any professional associations of people who do this specific kind of work?

A Well, it would be related to, as you indicated, forensic photography and there is an association of forensic photographers.

Q But then is there an association of people specifically who do this kind of work?

A I do not think so, I do not know of any. There are some related fields in which there are some associations such as the study of photogramity and things of this kind which deal more with arial type of photography than they do with this sort of photography.

Q But again, sir, there is no association that deals with this kind of work, right?

A Not that I know of.

Q Is there a publication that deals specifically with this kind of work?

A Well, there have been related articles I would

say published in the law enforcement field dealing with facial identification, things of that kind.

Q But there is no Journal of Photo Identification, if that is the word?

A No, not related to this specific study, no.

Q Would it be fair to say this is an art as much as a science?

A Well, I do not know. I think most everything is a combination of these two things so it is no more so than anything else. What you are doing is dealing with established things that are presented to you and relating them to each other or comparing them and that is a scientific approach at arriving at a conclusion. In most any area, and here we are talking with things that are recorded in the photograph and those things are shadows that have to be interpreted and things of this kind which the photograph is made up of, so that it is from that standpoint that you are dealing with certain facts that can be recorded this way.

Q But what we are dealing here with, sir, is your measurement of those facts and that is what?

A I made no attempt to come up with any exact measurements of any part.

Q So many of the things you are testifying to are questions of interpretation?

A Interpretation, that is correct.

Q For instance, you did not take a French curve and measure the curve of the jaw in such a way that it would be reduced to mathematical equations, did you?

A No.

Q You made no attempt to do it?

A No.

Q Or did you measure the width of the nose of the samples that are in Exhibit 31, right?

A No.

Q Nor the length of the nose?

A No, I just made a side by side comparison.

Q Side by side comparison?

Now, you do have some knowledge of photography, do you not?

A Yes.

Q It is estimated here, sir, that the camera that made that 35 millimeter film is a 35 millimeter camera?

A Yes, sir.

Q Do you know what kind of camera made the three photographs at the bottom?

THE COURT: 31 E, F and G.

MR. COHN: Thank you, your Honor.

A 31E and 31G, the film I received was a four

by five so it had to be a camera that would use a four by five film. I assume it was one of our cameras which is a speed graphic, a four by five camera.

Q Do you know what kind of lens, what the focal length of the lens was on each of the cameras used here?

A Well, the normal lens on this camera would be 135 millimeter. It could have been 150 but probably was 135 millimeter, which is what is usually put on that camera.

Now, this camera --

THE COURT: Referring to 31A, B, C and D.

THE WITNESS: No, referring to E and F, those two photographs.

THE COURT: G you mean, E and G.

THE WITNESS: E and G, yes, I am sorry, 31 E and G, that was a four by film which would have been, if it was one of our cameras, which I am sure it was, which is a speed graphic four by five camera with 135 millimeter lens.

Q What about your surveyance pictures?

A These surveyance pictures, 31A, B, C, and D, are from the 35 millimeter film, which, of course, was in a sequence bank surveyance, which, of course, uses 35 millimeter film.

Q What kind of lens does it have?

A I do not know the camera lens, it could have been a 50 millimeter lens. It could have been, it probably was a lens that was somewhat in that range of focal length.

Q You do not know?

A No, the size of the lens, the focal length of lens would not be material to the thing I did except that this would govern the size of the image on the film and, of course, if the lens had been a longer focal length, the image would have been larger on the film and there would have been more detail in the emission, which might have made a better comparison.

But at the same time, a lesser area in the bank would have been covered so when these cameras are put in, I am sure they are put in compromising for causes of expense so as to cover as much of the bank and yet to make as good a recording as possible within the economic range of the expenditure involved.

Q Isn't it true, sir, that the difference in focal length makes it difficult to determine by itself the comparison of the size of the two pictures? Hold it -- let me try to rephrase this in a way that it is clear, if I can. You told us to start with that you blew up the various pictures so that the head size was approximately the same.

A Yes.

Q The focal length at the bank film would start with a much smaller image of the head?

A Yes.

Q Than with the focal length of the 135 millimeter lens?

A Yes.

Q On the four by five camera?

A Yes.

(continued next page.)

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Q So isn't it fair to say, sir, that you start by making the head the same size with the assumption that these are the same people?

A No, you have to make the head the same size in order to compare them.

Q What if one person were larger or smaller to start with, wouldn't that make a difference in the comparison?

A I think the other features and by the other features you would find in such a comparison of that kind you would be able to eliminate them.

THE COURT: In your examination are you interested in measurement or shape?

THE WITNESS: Shape.

THE COURT: So it does not matter how big or small, you are looking for the same thing.

THE WITNESS: Yes.

Q Except isn't it true, sir, the more you blow up a picture the greater the distortion?

A No, sir, it is not.

Q It is not a distortion when you blow it up?

A No, unless you are dealing with an inferior enlarger. Your extortion -- distortion would only be created by poor equipment.

Q I thought you said extortion.

THE COURT: Strike it out. It was a slip and I'm sure it need not be called to the juror's attention.

Q What kind of lens was used on those two cameras, do you know?

A No, I do not know.

Q Is there a difference for instance in an achromatic lens or a rapid rectolinear lens and an anastigmatic lens or a achromatic lens, there are differences in all those, is that right?

A If you had lenses designed in those particular areas there would be differences, but a lens manufactured today is ordinarily produced to make all the corrections that are necessary with respect to the differences in the color of the light, the wave lengths of the various radiations that produce the light, as well as to the amount that the radiations have to travel through the lens and such as that in order to correct them to a very high degree so that all of these radiations meet at the same point back of the lens to produce an accurate image.

Q It is true, sir, in the recitation of lens types I gave you --

THE COURT: Excuse me, Mr. Cohn, if you are not going to use the photographs --

MR. COHN: I will ultimately.

THE COURT: I was going to ask the alternates to move their chairs back.

MR. COHN: I do not know when I will get to them but I think it will be fairly shortly, your Honor.

THE COURT: All right.

Q It is true that the difference in these kinds of lenses that I read to you isthe difference in the kinds of distortions that you get because of the construction of back lens, is that not a fair statement?

A Yes. If you did not have a lens that was corrected for these various factors then you would get out of focus, you might get pincushion distortion and things of that kind. Most lenses, the lenses we use and I'm sure most lenses used today in the trade have been highly corrected to avoid particularly with respect to this sort of thing, any distortion.

Q You do not know what kind of lens the bank cameras use, do you?

A I know what is commonly used. I know the type of lense commonly used and they are corrected.

Q What kind are they?

A The make?

Q Yes.

A I am sorry I do not know the make or that sort

of thing but I know that the lenses that are on the market today and that are used with respect to this kind of equipment have been highly corrected for these various factors.

Q Would it be fair to say that the difference or the major difference between a $100 camera and a $2000 camera is the lens?

A It would be, that would be I think a major factor, yes.

Q There are cameras by the way that do reflect that spread in cost, are there not, like the Heisserblock which costs well over $2000 and the average 35 mm. camera thatyou can get, you can buy for $100 if you are careful, right?

A Well, I do not know that.

Q Or $200.

A You take certain cameras that are in the inexpensive range, the difference would be the lens. Some of them have plastic lenses which many things you could not correct with plastic.

Q You do not know, sir, what kind of distortions, if any, you got out of either of these cameras because you do not know what lens? You assumed they used a good lens but that is merely an assumption, is that right?

A Well, I assume from looking.

Q Right, yes or no?

A I assume from looking at the film and seeing no result of distortion in the film, I think this would be the answer.

THE COURT: Are you able to recognize distortion in some film?

A Yes, I certainly could.

Q Would you recognize the difference in the shape of something which you had never seen before?

A Yes, you could, you certainly would recognize what ordinarily are parallel lines or what ordinarily are upright lines and things of this kind. I think distortion would be very evident.

Q The distortion, sir, can it not appear in certain place in the film and not others, in other words one of the problems of lenses it may focus unevenly.

A I never heard of it. You mean at different times?

Q No, I mean in the same place in the film at the time from a particular lens.

A There might be if you had a very cheap lens, there might be a defect at a certain point. Ordinarily your distortion in a lens that a lens would correct would be in the design of the lens. Perhaps if you were trying

to design a lens so as to take in a very small physical space, a lens of a long focal length, you might have to get along with some distortion and this would be evident in and around the edges mainly and I really have never seen it happen at one, at just one isolated point.

Q Not too often you have seen it?

A In a cheap lens you could have it.

Q Let us get to these pictures that you have compared. First of all, you said you compared the curve of the chin.

A Yes.

Q The curve of the jaw, I am sorry, and the shape of the chin but you did not measure those in terms of a particular curve structure or anything, they just looked alike, right?

A Yes.

Q To you. And then you said the lip size and the protrusion of the lips are the same?

A Similar.

Q Similar -- I am glad you said that, sir.

THE COURT: Strike it out and the jury will disregard it.

Q I will withdraw that. Now it is true, sir, and I think we can all agree that the person depicted in

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31 A through D is black, right?

A Yes.

Q It is not uncommon amongst black people that they have thick lips which may protrude, right?

A That is right.

Q Now one thing you said also, you said the protrusion of the lip was shown more in 31C then in 31E, right?

A Yes.

Q So that there is a differentiation that is made by the film itself or by the manner in which it was taken, right?

A No.

Q Why? Would you explain that to us?

A It is a turn of the head. You get more of a profile, actually you get a three-quarter view which does show more of the protrusion of the lips.

Q But it makes the angle comparison different, right? You are comparing the angle in C with the angle in E and there is somewhat of a difference, is there not?

A The angles are somewhat different, yes.

Q And so it makes it difficult to measure that protrusion?

A Yes, I do not think you would be able to

measure it.

Q Or even to say even with any degree of accuracy or confidence that the protrusion was the same.

A I think the characteristic is the protrusion is consistent in the two photographs as I described.

Q Or similar.

A Either one.

Q Then you said that the nose was smooth and the nostrils were protruding.

A Yes sir.

Q On both sets of pictures?

A Yes.

Q By the way, in that comparision that you have been doing have you been including the small picture 31F or have we not been discussing that?

A I included it somewhat, particularly with respect to the nose and chin and lips, yes. The ear does not show there to any extent at all.

Q Well sir, did you not once file a report that said that the angle for that picture was wrong for you to be able to make any answer?

A Well I do not --

Q Sir if I can finish my question before you argue that. Did you not once make a report, which I believe

you sent to the United States Attorney or FBI, I do not know, where you said the angle of that picture was inappropriate for you to make any valid comparison and you asked that other pictures be taken?

A No sir, my report did not say that.

Q What was it that it did say, if anything?

A My report says that the characteristics with respect to this one photograph, 31F, which is a photograph I originally had compared with the photographs from the bank surveillance film, the characteristics that could be compared were consistent and that based on that I concluded that this person depicted in these bank surveillance photographs could be this individual. That is the way it is stated.

Q You did not ask for some other pictures to be taken?

A I admised the office in a separate communication that a further comparison should be made if additional photographs were made and in making such additional photographs it would be advisable to attempt to reproduce the angle or close to the angle that the camera was in the bank.

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MR. COHN: Your Honor, I have to find the reports. This might be a good time to suspend.

THE COURT: All right. We will suspend until 2:00 o'clock for lunch. Again, please do not discuss the case. We will start promptly at 2:00.

(The jury left the court.)

MR. CLAREY: Your Honor, I do have a matter.

THE COURT: What is it, Mr. Clarey?

MR. CLAREY: Your Honor, in response to a call made to Greenhaven this morning I received the following information by message from my secretary. A psychiatrist's report dated September 17, 1970 written up by Dr. Seymour Feldman. This is in response to an inquiry about Wilbur Roland, psychological report dated 12/5/69 regular test given to every new inmate. If you need to know contents of report you will have to send subpoena to Mrs. Precious. I suggest we call Mrs. Precious perhaps from your chambers under more official auspices and ask her to read the report to all of us over the phone.

MR. COHN: That is satisfactory to me, your Honor.

THE COURT: Get back to my chambers at ten minutes to two.

I will tell you this, if we are through with Mr. Webb and your other witnesses, whom I believe is a fingerprint expert --

MR. CLAREY: A fingerprint expert plus two very brief witnesses.

THE COURT: And if all the evidence is in and we still have time I am hoping you will sum up today and I will charge the first thing in the morning.

MR. COHN: Well, I may have one or two witnesses, your Honor, this afternoon. I would appreciate an opportunity to sum up to the jury tomorrow. I would appreciate the opportunity to work on my summation overnight.

THE COURT: I may decide to start early tomorrow. In other words I want to give the jury plenty of time to deliberate before the afternoon. The way the case is moving along I thought it would even be posible to sum up today but if not we will sum up tomorrow.

MR. COHN: I will tell the court that in a trial of this length if I took an hour with my summation I would be outrageous. I do not think it will take that much time for me to sum up, it is not a promise, it is an estimate.

THE COURT: I am trying to estimate the length of time so that I can give it to the jury before 10:00 o'clock tomorrow and give them an entire afternoon to deliberate.

MR. COHN: Your Honor, pursuant to your request I have requests to charge here.

THE COURT: Serve a copy on Mr. Clarey. I assume you have none.

MR. CLAREY: I have none.

MR. COHN: I would ask the court to bear with me and allow me to submit tomorrow morning a request on expert testimony.

THE COURT: All right.

THE CLERK: Defendant's request to charge marked Court Exhibit 2 for identification.

THE COURT: 2:00 o'clock and the lawyers will come to my chambers at ten minutes to two.

(Whereupon at 1:00 o'clock pm recess was taken until 2:00 pm.)

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AFTERNOON SESSION

THE COURT: I would like to say for the record that both lawyers were in chambers. I usually have a reporter in chembers but this was to receive a telephone call from the director -- his official title is Director of the State Bureau of Corrections?

MR. CLAREY: The New York State Commissioner of Corrections.

THE COURT: We were unable to contact him.

In the meantime, the lawyers advised me of two other matters. One that Mr. Cohn inadvertently expressed an opinion of Mr. Webb's testimony in the hearing of the jurors. And I will make a brief statement about it and tell them to disregard it as it was an inadvertance.

The other is Mr. Brown would like known that Mr. Kearney --

MR. COHN: It is spelled Kearney. It has been spelled wrong throughout the transcript.

THE COURT: And the purpose I understand was to show one that Mr. Kearney was never indicted for the bank robbery and of course it having occurred in this district Mr. Clarey could concede that, and the other is that Mr. Green is deceased.

Mr. Clarey, what have you got to say on that?

MR. CLAREY: Mr. Kearney has not been indicted in this office in this Federal District for the bank robbery in question.

THE COURT: Any place?

MR. CLAREY: I know of no other indictment.

THE COURT: Are you ready to concede?

MR. CLAREY: I will concede for these purposes that he has not been indicted anywhere.

THE COURT: For this bank robbery.

MR. CLAREY: I would object to relevancy.

MR. COHN: It goes to the testimony of Mr. Roland. Mr. Roland makes this kind of a statement and we find only one person indicted at this late juncture and I believe the jury is entitled to make some inferences from that if they choose.

THE COURT: I disagree. I agree with Mr. Clarey, it is irrelevant.

The only thing is, Mr. Cohn, he could conceivably come in and testify that he didn't commit the robbery. That would go to credibility of Mr. Roland. That is a lot different than saying you didn't indict him. The alternative is we would have to bring Mr. Kearney in from the Bronx.

MR. CLAREY: If that is the alternative. I will stipulate it on the records and I will have to

handle it in my summation.

THE COURT: What will you say?

MR. CLAREY: If brought up by Mr. Cohn in summation, I will say it is of no import in this case one way or the other.

MR. COHN: I would intend to mention the only person indicted out of that case is Mr. Brown.

THE COURT: But you understand that Mr. Clarey --

MR. COHN: Anything I say in my summation is fair game.

THE COURT: I want you to know that would be the comment. I agree with Mr. Clarey, I don't think it would be material. If you subpoenaed Mr. Kearney I would allow Mr. Kearney to testify and say I was not there.

MR. COHN: Except in this case because of the extensive immunity, I think it would be more relevant than normally. We have been blocked, and I don't like to bring this up, from the whole area of that immunity and now we get a lot of immunity and Mr. Brown is the only target of it and the jury is entitled to examine that.

THE COURT: I believe it misses the merits by a mile but I say if what is admissible will not be offered, I think in substitution thereof the defendant

wants to take it, that concession should obviate it --

MR. CLAREY: Does he also want a concession that Woody Green is dead?

MR. COHN: That is a reason for him not being indicted. That possibly explains the reason, because he is dead.

THE COURT: Well, I don't think --

MR. COHN: I would be glad to say Woody Green was not indicted.

THE COURT: That's what you'd like to say.

MR. COHN: But I haven't offered that.

THE COURT: I understand. What Mr. Clarey is willing to say is Woody Green is dead. Do you want to give the date?

MR. COHN: I don't know the date. I will be willing to say it was after the robbery in question. After the bank robbery. I don't know the date.

THE DEFENDANT BROWN: January 22nd.

THE COURT: What year?

THE DEFENDANT BROWN: '73. He was ambushed and killed.

MR. CLAREY: I will stipulate the date given by Mr. Brown. I assume it is correct.

THE COURT: Assuming it is correct, are you willing to do it that way?

MR. CLAREY: Yes.

THE COURT: All right, we are ready for the jury now. You may put the chairs back.

I might say if I forget when the jury is here, when the jury leaves tonight I am going to advise them that they are going to be given menus and orders for them to order their lunch so that they will be here for lunch tomorrow.

I would appreciate it, Mr. Cohn, if you take up with Mr. Brown if the jury is deliberating Friday --

MR. COHN: I will take it up with Mr. Brown immediately.

(The jury is in the jury box.)

THE COURT: What is Mr. Kearney's first name?

MR. CLAREY: Melvin.

THE COURT: Before we continue the cross examination of Mr. Webb, two matters were brought to my attention which require my advice to you.

The first, Mr. Cohn properly advised me while in the hallway talking to his secretary and believing that he was speaking privately and only to her, he expressed some opinion as to the credibility of the testimony. And he thinks one or more jurors might have heard it.

Of course, the lawyers know they are to have no

contact with jurors. And sometimes it reaches a point where jurors are offended where lawyers won't even nod or acknowledge their presence and say hello.

This is only to emphasize the importance to the lawyers attached to keeping the jury separate and apart as a judicial function and away from the private opinions of lawyers.

You know Mr. Cohn and Mr. Clarey are personally involved with their clients position. They both believe in their clients' position. And if any of you didn't hear what Mr. Cohn said about the testimony, I am quite sure if you heard Mr. Clarey's opinion you would find that it would be neutralized. The same force on one side as you would find on the other.

The important thing is you should pay no attention to anything you hear accidently at random. As I say, Mr. Cohn regrets it. He properly advised me of it and you have an obligation to just disregard it totally. It is just one man's opinion as they say.

Now, in lieu of calling a witness for the defendant the Government has stipulated the following: First, that Melvin Kearney was not indicted for this bank robbery.

Secondly, that Woody Green died on January 22, 1973.

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I think that takes care of all the preliminary business.

MR. COHN: It does, Your Honor.

CROSS EXAMINATION

BY MR. COHN: (continuing)

Q May I ask you, sir, if you recognize any photographic or Xerox reproduction of a report that I hand you?

A Yes, sir.

Q Could you tell us without telling us the contents yet what that is?

A That's a report which resulted from my examination of the surveillance film in this case with the first photograph that was submitted to me which was represented to be a photograph of Henry Stuart Brown.

THE COURT: Of course, you are referring to 31-F, are you not?

THE WITNESS: That would be 31-F.

THE COURT: The one in the middle on the bottom?

THE WITNESS: Yes.

Q You say although your signature is not appended to that that is your report, is that correct?

A Yes, this is a report of it, yes.

MR. COHN: Your Honor, I ask this be marked for identification if the prosecutor will stipulate we

need not have the original --

THE COURT: Are you marking it for identification or in evidence?

MR. COHN: No, for identification.

THE COURT: Anything can be marked for identification.

MR. COHN: That will be Defense B for identification.

THE CLERK: So marked. Defense Exhibit B for identification.

Q Now, in the report, sir, did you say in pertinent part that: "It has been concluded that these photographs could be of the same person but a definite determination cannot be made due to the lack of specific identifying characteristics.

Did you say that?

A Yes.

Q Now, one of the things you stated is the eyebrow that you could see from behind the glasses was similar or consistent with the eyebrow of E and G, Exhibit 31-E and G, is that right?

A Yes.

Q Could you get a good look at that eyebrow on 31-C? Is there a good view of that?

A Yes.

Q You want to take a close look at it and describe it to me?

(Witness steps down from the witness stand.)

THE COURT: If you are going to point anything out, we will have to move the photograph right up to the jury box.

Would you rather sit or stand for this?

(The alternates stand.)

THE COURT: All right.

Q Describe the eyebrow in either C or D?

THE COURT: If the jurors wish when something is pointed out you can either stand up or move forward to get a better view.

A What I was referring to with respect to the eyebrow is the curve of the eyebrow and also with respect to the density of the eyebrow, the width of it, and comparing it with 31-E and G.

Q You stated, sir, that one of the things, -- I think you stated earlier that one of the things -- that might be an identifying characteristic and cause a more positive identification of a person in a photograph comparison is scars or unusual marks?

A Yes.

Q 31-C or D, do you note any such scars or marks?

A I can't find any on those photographs.

Q I ask you to look, sir, at the left eyebrow of the person that is listed Brown in 31-G, and I ask if you see any scars?

A It appears there may be a scar near the center.

Q Near the center?

A Yes.

Q You may be seated, thank you.

MR. COHN: Your Honor, we have earlier agreed at side bar that because of the evidence given by I believe Mr. Harrison, I believe about a bald spot and now because I believe the jury will not on cross examination --

MR. CLAREY: I object.

THE COURT: No statements. Would you like Mr. Brown to walk before the jury?

MR. COHN: I would had I called particular attention to the jury of his left eyebrow and inside the hairline on the lefthand side was I believe the testimony of Mr. Harrison.

THE COURT: Mr. Brown, if you wish, would you please walk before the jury and show your left eyebrow and back of your head. Don't point to anything or say anything.

THE DEFENDANT BROWN: Wait --

THE COURT: Don't say anything. You are not

under oath. This is just to give you a look. 416

And the back because Mr. Cohn would like them to see the back of your head on the left side.

Is that sufficient, Mr. Cohn?

MR. COHN: If it satisfies the jury.

THE COURT: The jury can get up if they wish.

MR. COHN: It should not embarrass any members of the jury if they want to look. You can tell them that, Your Honor.

THE COURT: Thank you, Mr. Brown, you may be seated.

(continued on next page.)

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Q Now, sir, we come to the ear, which you described at great length.

There is no signs of earprinting, is there, like fingerprinting?

A They have to be almost through photographs.

Q That is true. You wouldn't get an ear print like this (indicating)? But there has to be some characterizing of ear types of construction so that one -- and files kept on that so that one ear might be determined from the other such as fingerprints?

A It has been but not with respect to individuals, but with respect to -- well, the making of artists' renditions and descriptions.

Q In other words, by general type, somebody might say it is a Type 4 ear and in the artist's rendition you put in a Type 4 ear?

A Yes.

Q How many kinds of ears are there?

A I don't know. There are many different kinds.

Q It is finite and not infinite?

THE COURT: There may be 100, 200, or 10?

THE WITNESS: I don't know a definite number. It is many, many. In each class it would vary too.

Q You stated that the picture, the surveillance

picture of the individual we have been calling Number 1 throughout this trial was somewhat -- was not too detailed in that area because of the resolution of the picture, is that fair to say?

A Yes.

Q The resolution of that picture is rather hazy because of the way it was blown up?

A With respect to minute detail, yes.

Q You couldn't make a solid comparison the way you would if you had a good shot?

A The starting point is what is recorded in the surveillance film.

Q If you answer my question, sir, you could not make the same kind of comparison that you could if you had a good shot of the ear in both pictures?

A Couldn't go as far.

Q In fact, sir --

THE COURT: Alternates number 1 and 2 may now be seated.

MR. COHN: Sure, I'm sorry.

Q I don't know where I was.

Isn't it fair to say, sir, that you could not make a really accurate comparison but merely say it might look like the ear of the same person because of what you saw was constructed --

A What I said was all the formation that was recorded in the bank surveillance photographs was the same as that recorded in the other photographs.

Q That you could see?

A Yes.

Q And some were too hazy, you couldn't compare --

A Because they were not recording.

Q Not recording or too hazy?

A Not recorded in the surveillance film.

THE COURT: When you say recorded, you mean it wasn't photographed in such detail, is that what you mean?

THE WITNESS: The problem is this, the bank surveillance film is 35 millimeter, which is a rather small area to make such a recording. When this small area, most of the interior of the bank has been recording, the individual is very, very small and the recording is done with grains of silver on the films and these are globs of silver which if they were to record a larger area sufficient to get it in detail, but in such a small item --

THE COURT: I wanted to ask you the question because when we think of recording, we think of recording something, writing something down.

THE WITNESS: Recorded by the light on the film.

THE COURT: That's what you mean?

THE WITNESS: Yes. And I'm sorry.

THE COURT: That isthe only point I wanted to make. I am interested in the jury understanding your language.

THE WITNESS: Yes sir.

Q Now, it is possible that other people could have the same ear construction from what you saw as that which you saw there?

A Yes, similar ear.

Q In fact, sir, isn't it fair to say what you told us here and your opinion is that that which you could see which was clear enough to see of the surveillance pictures were similar to Henry Brown, the other pictures E, F, and G or someone that looked like him?

A Yes sir.

MR. COHN: Thank you, I have nothign further.

MR. CLAREY: Just a couple of questions.

REDIRECT EXAMINATION

BY MR. CLAREY:

Q Mr. Webb, did you examine that first picture in the middle of the bottom? I can't see the number.

THE COURT: Suppose you bring it out.

Q Did you examine that picture at a different time than you examined E and G?

A I had at first and the second time I had all of them.

Q Are E and G the results of a request by you?

A They were the result of a suggestion, yes sir.

Q What was that suggestion?

A That further photographs be submitted and if possible those photographs be made with the camera from approximately the same angle as the camera in the bank to show the face from the same size and things of that kind.

That is in general what the request was. Or the suggestion.

Q Now, I will direct your attention to 31C and D, that scar you see in C, is it possible that the distortion you described would not allow that scar to be shown in C and D?

MR. COHN: Objection.

THE COURT: May I have the question.

(The last question was read by the reporter.)

THE COURT: Sustained as to form.

You may ask the witness what he sees on a specific photograph. Don't suggest to him.

Q Do you see that scar on C and D?

A No, you cannot see in either 31C or 31D the scar. This scar is very minute in characteristic.

And it is not such as to be recorded in that type of photography.

I think I originally said that in the original part of my testimony.

MR. COHN: I move to strike that out.

THE COURT: Strike out "I think I originally said that."

MR. CLAREY: No further questions.

THE COURT: Anything further, Mr. Cohn?

MR. COHN: I may have one question, your Honor.

(Pause.)

RECROSS EXAMINATION

BY MR. COHN:

Q I show you again defendant's Exhibit B for identification. Is there another page to that to your recollection?

A There shouldn't be. I don't think there is.

Q Could you tell me, sir, if you see on there anywhere a request that other photographs be made?

A No.

Q You do not?

A No.

MR. COHN: Nothing further.

THE COURT: Anything further, Mr. Clarey?

RE-REDIRECT EXAMINATION

BY MR. CLAREY:

Q Would that be forwarded to you on a separate page?

A Yes, that suggestion was made in a separate communication, not a report.

MR. COHN: In that case, might I -- might you direct that I see that?

THE COURT: Do you have that? Do you think you could be helpful in finding it?

THE WITNESS: I have a copy upstairs. I can testify to what it says.

MR. COHN: I can wait.

THE COURT: We will take the next witness' testimony and it will be shown to you. If it is produced, may I have the right to tell the jury it was introduced?

MR. COHN: Of course, your Honor.

THE COURT: Step down and look for the letter. In the meantime, call your next witness.

MR. CLAREY: Agent Murphy.

GEORGE J. SMALL, called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLAREY:

Q What is your occupation?

A Special Agent, FBI.

Q Where are you assigned?

A New York City.

Q WEre you assigned in that office in January of 1972?

A Yes, I was.

Q On the 10 of January, 1972, did you have occasion to go to the Bankers Trust on DeKalb and Sutter in Brooklyn?

A Yes.

Q What time did you arrive there that day?

A I would say mid-morning to the best of my recollection?

Q Why did you go there that morning?

A We received word that the bank had been robbed.

Q Did you perform any duties in that bank on that morning?

A Yes.

Q What did you do?

A I dusted for fingerprints.

MR. CLAREY: May I offer this card marked.

THE CLERK: So marked as Government's Exhibit 36 for identification.

Q I will show you Governmetn's Exhibit 36 for identification, Agent Small and ask you if you can identify it?

A Yes, sir, I can.

Q What is it?

A It is a lift made of latent prints found at the scene of the bank.

Q Was this in Bankers Trust on the morning of January 10, 1972?

A Yes.

Q Did you make that lift?

A Yes.

Q Where did youmake that lift?

A It was taken off the door leading to the teller's office.

Q Do you know what door that is, and I will direct your attention to the diagram on the wall, Exhibit 2A in evidence.

A Yes, sir, right here.

THE COURT: Indicating the place marked "door" encircled.

Q Thank you.

You may resume your seat.

Do you recall where on that door you picked, or lifted these prints?

A The exact location, no.

It was on the outer perimeter of the door leading into that teller's area.

Q What part of the door did you dust?

A Yes, mostly the glass area which would be I would say midway up on the door.

Q Would you please explain what you mean by dusting?

A It is the process by which we use a powder and apply it on a surface and determine whether there is any latent print left by anyone.

It is lifted by utilization of tape which is placed on the card, these cards are then sent down to the Identification Division to determine if any of them are of any value.

THE COURT: Tell the jury what a latent print is.

THE WITNESS: Well, your Honor, it would be a print left by someone by touching a surface.

It is brought out by use of this powder.

THE COURT: Isn't it one that you can't see?

THE WITNESS: That's correct.

THE COURT: And the dusting brings it out?

THE WITNESS: That's correct, sir.

MR. CLAREY: I haveno further questions of this witness.

THE COURT: Mr. Cohn.

CROSS-EXAMINATION

BY MR. COHN:

Q Did you dust, sir, the counter, at all?

A Yes, sir, I did.

Q Did you find a palm print when you dusted that counter?

A I don't recall that I did. I believe there was another agent assisting in the dusting.

Q Who was that?

A I believe Agent Berry was also there.

Q And he was assisting in the dusting?

A That's correct.

Q Now, this set of fingerprints that you lifted that is reflected by that card, are those theonly finger-

the evidence in this case. Nobody says Patrolman Sutherland was a liar. Nobody says that Mr. Francis was a liar, or that Mr. Mascoll was a liar. Indeed not. That is one kind of evidence.

What is in question here is some of the inferences which you should draw from that evidence, but the evidence itself, the cold, hard facts, if such can be called evidence in a criminal trial, is not in doubt at all. Not in question.

Then there is testimony where the veracity of the witness is in sharp contrast, and that is Mr. Roland. I will discuss Mr. Roland at length, and hopefully keep my remarks from being too pungent for the confines of an august proceeding such as this, but I will discuss him and his veracity and lack of veracity.

There is really a third kind of evidence, or non-evidence. That is what you did not see in this case. What the government has not presented to you. The government, because it has this burden of proof, has to present its case, and failure to present pieces of evidence that might be important in shoring up other pieces of evidence can be commented on by me and maybe considered by you and

proper inferences drawn from it.

For instance, where was the Hertz Rent-a-Car agent or Security guard, or whether -- whoever he was that was held up, allegedly by Woody Green and Roland? There was a situation where they were unmasked in a fairly well-lighted area for 15 or 20 minutes, where there was an opportunity to observe them. There is no identification testimony from him as to that event. Why not? You may ask yourself that question. You may ask the government through your deliberations that question. Why not? Was Mr. Green there? Would the agents have known? Where is police testimony as to the stolen car? Was it recovered? The Hertz Rent-a-Car that was allegedly parked two blocks away, I think it was Green's house on Bainbridge.

Now, introduction of evidence of the recovery of that car two blocks away from Willie Green's house would have been powerful, powerful testimony in showing up the testimony of that man. But we didn't see it, and you may ask yourself why not, and you may infer from that the reason why not is the reason he didn't park it there. If he had parked it there, you could be sure that a thorough

prosecutor like Mr. Clarey would have brought you that car, or somebody that picked up that car, a police officer, and said, "I picked it up. It was two blocks from Woody Greens house."

Remember, Mr. Roland said, "I left it there. I don't know if I left the keys there or not."

That car was abandoned two blocks from Woody Green's house. This isn't a pickpocket case; this is a bank robbery. Where was the testimony of one person who could come into this courtroom and say that man over there was the man I saw in the bank?

Did Mr. Clarey ask one person that? No. Did anybody volunteer that? No.

In fact, the only i.d. testimony you get from June 5, 1972, when the fingerprints were identified until now, was the testimony of Mr. Mascoll who is present with those seven pictures, which are in evidence as a defense exhibit, where one month ago, he picked out the wrong man.

Mr. Clarey may tell you and I may be presumptuous in anticipating his argument, "Listen, memories fade over two years." But indeed they do. But why wait two years to go in and ask somebody who is an eyewitness to an event?

THE COURT: I think I ought to instruct the Jury to strike that remark. It is not part of this case. The indictment was returned and we start from there.

MR. COHN: You may infer from lack of evidence, from lack of particular facts being brought forward by the Government because again the Government is, for a good reason, treated differently than the defense in terms of what it must do. You may infer that failure to bring forward a fact which is important in the proof of their case, you may infer from that that fact had it been brought forward would not have been favorable to the Government's case. If they told you were the car was, if it was recovered --

THE COURT: I do not agree with that principle of law and I will charge you on the failure of the Government to, one, produce witnesses, and two, the failure to produce evidence, enough evidence to satisfy its burden. They are two separate principles.

MR. COHN: Well, what was brought forward in this case essentially? The fingerprints of Mr. Brown in the bank some three to five blocks away from his home where he was living. There are pictures, dubious quality pictures and I suggest of no value. There are fright tales of employees of the bank who were most

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MR. COHN: I withdraw my request.

THE COURT: All right.

Seat the jury.

(the jury is in the jury box.)

THE COURT: Mr. Foreman and ladies and gentlemen of the jury. We have arrived at that point in the trial where it becomes my duty to instruct you on the applicable law. First I think it is important to recognize three spheres of participation in a jury trial. First, we have the lawyers. This is called an adversary proceeding. That means that two parties, sometimes more but in this case two parties, are adversaries. They contest with each other over fact issues. Fact issues being issues of what happened at a particular time and place.

Now, the lawyers represent clients. Mr. Clarey represents the Government and Mr. Cohn represents Mr. Brown. And they are partial, zealous, they have points of views and they have definite opinions. And that is to sharpen their argument and it is all to the good for in the contest over the facts the evidence is developed in the trial.

Now, as between the lawyers on the one hand and the Court and jury on the other, the attitudes are significantly different. The Court and jury are

objective, decisions are based on the rule of law, and made dispassionately having no interest in the outcome except to do justice and nothing else.

Now, as between the Court and the jury, there is a clear line of demarcation on authority and purpose and power. The Court is the sole judge of the law. During the trial you notice I've made rulings. The rulings were made solely on the basis of what I understand the law to be. It wasn't intended to indicate to you that I favored one side or the other. I have no opinion as to how the outcome of this trial should be, no opinion of the guilt or the innocence or whether you should render a verdict of guilty or not guilty. That is solely for your determination. In ruling on objections, I ruled on arguments made by lawyers. Don't count the number of times I ruled in favor of one party or the other. I don't even recall. It was of no moment to me as soon as the ruling is made. The point is the lawyers have an obligation to protect the rights of their clients and that is the way of protecting rights by objecting to matter because they feel that it is improper as a matter of law.

Now, just as the Court is the sole judge of the law, so the jury is the sole judge of the facts. And just as I am obliged to accept your determination as

to what happened on January 10, 1972 at the Bankers Trust Company at the DeKalb and Sumner Street in Brooklyn, and just as I am obliged to accept your verdict of guilty or not guilty, so you must accept the law as I charge it. You may feel that it is an unfair law. You may feel you could have drawn a better law. But you violate your oath if you refuse to accept the law as I charge it. Or if you fail to apply it as I charge it. That pretty well outlines the various participants in the trial and it is important that you understand it because when we talk about fair trials we must understand what the obligation of each participant is in the trial. And understand the limits of our authority, and so that when each side does its job in accordance with its obligation and authority, we should have a fair trial.

Now, the lawyers have performed their duties and performed them well. I have to this point done everything in my power to give the parties, both the Government and Defendant a fair trial. And now it is up to you to decide the facts of this case free of all bias, free of all prejudice and free of all sympathy.

The Defendant is presumed to be innocent. Symbolically we say he starts with a clean slate as

to the two charges in the indictment. You must recognize even though there are two counts the charge is a single bank robbery, and I explained to you at the outset count two is the graver charge and has an additional element. The Government charges a bank robbery, an armed bank robbery.

So Henry Stuart Brown starts with a clean slate that is afforded him by the presumption of innocense. A presumption is a conclusion which the law requires the jury to make. So at the very outset of this trial, you must conclude that Henry Stuart Brown is innocent of the charges in the indictment. And that conclusion, the presumption, prevails throughout the trial and throughout your deliberations, and is enough to acquit the Defendant. It is only if the Government proves the charge or charges against Mr. Brown by proof beyond a reasonable doubt that you may convict the Defendant.

So the presumption of innocense alone is enough to acquit, acquit the Defendant of the charges.

Now, reasonable doubt is a doubt based on reason and common sense, and the state of the record. That means the evidence in the case as distinguished from some emotional doubt or some vague or speculative doubt.

Charge

A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. If after fair and impartial consideration of all the evidence you are not satisfied that the Government has proved the guilt of the defendant -- in other words, if you would have such doubt as to cause you as a prudent person to hesitate acting in a matter of importance to yourselves, then you have a reasonable doubt and in that case it is your duty to acquit -- to find the defendant not guilty.

Proof beyond a reasonable doubt is thereof proof of such a convincing nature that you would be willing to rely and act upon it unhesitatingly in the most important and weighing of your own affairs.

Now, the Government starts with the burden of proving the guilt of the defendant beyond a reasonable doubt and must carry that burden throughout the trial. The Government's burden is not to prove the guilt of the defendant beyond all doubt, nor is it the Government's burden to prove that all the evidence and every bit of evidence it produced before you is true beyond a reasonable doubt. The Government's burden is to prove each and every essential element of the crime charged beyond a reasonable doubt.

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Now, I will charge you later on what the essential elements of the crimes charged are.

Reasonable doubt may arise from the evidence or from the failure of the Government to produce evidence. The defendant is not obliged to produce any evidence. Now, Mr. Cohn made some reference to the failure of the Government to produce some proof through two witnesses. A failure of the Government to produce the man who Mr. Roland says was assaulted or robbed at the Hertz Car Rental Agency and neither documents or testimony of where the stolen car was abandoned. This is not inconsistent -- the charge I am about to give you is not inconsistent with what I said. A reasonable doubt may arise from the failure of the Government to prove its case and that includes-- I am sorry,strike that. A reasonable doubt may arise from the failure of the Government to produce proof, and that the defendant is not obliged to produce any proof, doesn't have to subpoena witnesses. However, Mr. Cohn said that you may infer from the failure of the Government to produce those two witnesses that if they were produced they will give testimony that would weaken the Government's case or contradict Mr. Roland. That's where I differ with Mr. Cohn. You should be

advised that even though the defendant need not produce proof, he still has the power to subpoena anyone he wants to and where we find, and where the law finds, that witnesses are controlled by neither party, or putting it affirmatively, are under the equal control of the parties, you may not draw an adverse inference from the Government's failure to produce the witnesses.

Evidence is the method through which the law provides for proving or disproving a disputed fact. There are two general classifications of evidence. One is direct evidence and the other is indirect evidence, commonly called circumstantial evidence. There is no mystery as to the classification. I will define it for you and then I will give you an example. I think you learn more from the example than the abstract definition.

Direct evidence is the testimony offered through witnesses of what the witnesses saw or heard.

Circumstantial evidence is a method of arriving at a determination on disputed facts by drawing inferences based on common sense and experience from established facts.

Now, that is hard to grasp, I know, but if I

give you an example I think you will better understand it. Let's assume for these purposes that you were sitting here as a jury in a civil action and let's assume that Mrs. Smith was suing Mr. Jones for personal injuries she said she suffered when she said Mr. Jones was driving this Cadillac at an excessive rate of speed and passed a stop sign without stopping and knocked her down causing injuries.

Mr. Jones said no, that isn't the way it happened. He says, I came to the corner and I stopped at the stop sign and then proceeded.

Now, in determining the disputed facts you must identify first what is the dispute. And so here Mrs. Smith says Mr. Jones passed the stop sign without stopping and Mr. Jones says no, I stopped first.

Let's assume for the moment that my Courtroom Deputy Mr. Adler and myself happened to be at that particular corner at that particular time and that we were talking about some personal business, and Mr. Adler was facing me and at the same time facing the roadway and the stop sign. And let's assume that I had my back to the stop sign. We are both witnesses. Obviously Mr. Adler because he saw the incident itself. I, less obviously, because my back was to the stop sign.

Nevertheless, I am qualified to testify to what I did see and hear. Mr. Adler if called substantially would testify as follows: I was standing at the corner talking with the Judge and outside of my left eye coming within my peripheral vision I saw a 1974 white Cadillac traveling at about 65 miles an hour. I saw the stop sign in view. I saw the motor vehicle pass the stop sign and strike Mrs. Smith. That is direct evidence.

I, on the other hand, as I say am qualified to testify too. I might testify that I saw the motor vehicle traveling at about 65 miles an hour, the 1974 white Cadillac, and I lost sight of it when it passed behind me and it might have been about 100 to 125 feet, and then 3 or 4 seconds later I turned to my left and saw the motor vehicle strike Mrs. Smith.

Now, it is easy to understand the direct testimony. You can accept that on the issue as to whether the car passed the stop sign. But my testimony would be circumstantial on the same issue. After all, the car traveling at 65 miles an hour, if I lost sight of it for 100 or 125 feet or 3 or 4 seconds, I think you could make a common sense reasonable inference from those established facts that Mr. Jones did not

stop at the stop sign because the car traversed 100 to 125 feet in 3 or 4 seconds. On the one hand you have direct evidence of the issue and on the other hand you have circumstantial evidence of the issue. The law does not hold that one type of evidence is necessarily of better quality than the other. The law requires only that the Government prove its case beyond a reasonable doubt both on the direct and circumstantial evidence. At times the Jury might feel that circumstantial evidence is of better quality. At other times they may feel direct evidence is of better quality. That judgment is left entirely to you.

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What is the evidence in the case? We say evidence and record -- it's the same thing. First is the sworn testimony of witnesses regardless of who may have called them. In appraising whether the Government has won the case or not, the number of witnesses does not matter, or whether they are called from one side or the other. You judge the case, and you decide whether the Government proved its case on the believable testimony.

Two, the exhibits that are marked in evidence. Now, at times you will find that some documents are marked for identification. That only means that when a witness discusses something and discusses a document that is not in evidence, it must be identified so someone else later on who reads the record will know what that witness is talking about. But until it is actually marked in evidence it is not before the jury. You only see what is marked in evidence. You may have not kept a record of it and I don't know what has been marked in evidence, and you may be asking for materials that were only marked for identification and I will tell you at this time that I am sorry, I can't give you that, it is not in the record.

In addition to the testimony and the exhibits

in evidence, the record, the evidence is also the facts to which the parties have stipulated. In addition to that, facts which the court has judicially noted. I may have judicially noted -- oh, I know I judicially noted that the indictment was filed on November 1, 1973. That's the record. On that and on the fair inferences that you make from the record based on your good common sense and experience you will decide this case. You with your good common sense and experience. That is the very useful tool that every juror has in this search for the truth that we all talk about.

It is helpful to know what is not part of the record. The opening by counsel; the closing remarks by counsel; sometime some random remarks which you may have heard out in the hall or heard here, dismiss that as part of the record, as part of the evidence. The opening -- when I said dismiss that, I meant random remarks, but pay a lot of attention to what these lawyers said. It is important. As I say it serves a very useful function. I believe you recognize now that an outline of the case was helpful in following the case.

Now, of course you attach no significance at

all to Mr. Cohn waiving his opening. He had a right to do that, that is a lawyer's choice and that's the way he felt about it.

But the closing arguments are designed to focus attention on what the lawyers believed to be the important evidence in the case. And arguments were presented to you by Mr. Cohn, arguments of exculpability. In other words, Mr. Cohn argued to you that the Government failed to prove its case beyond a reasonable doubt.

Arguments of Mr. Clarey of inculpability. Arguments by Mr. Clarey that the Government did prove the case beyond a reasonable doubt. All these are guides, they are helpful tools. If an argument sounded attractive to you you may want to adopt it. You may think it's good. You may want to even argue it to your fellow jurors.

On the other hand, you are at liberty to just reject any theory of inculpability or exculpability made by the lawyers. And even of course at liberty to reject it all.

I don't recall making any statements, and I don't recall referring to the evidence. If I did, don't attach any significance to my recollection of

the evidence. I try to impress on juries that I am just a human being in a robe. I have no better memory than you have. I dare say some of you have a much better memory than I. So don't say, well, the judge said it. Nonsense, it is in the record. The same thing goes for any questions I asked. I don't recall asking too many, but don't attach any special significance to questions I asked. I did it solely because sitting here some area might have been a little cloudy or fudgey or I thought a question or two might clear it up for me because I thought you might have the same problems I had and it will clear it up for you and that was the only purpose.

At times answers were stricken from the record; objections to questions are sustained. Now, if it is stricken from the record and when I said: Jury, disregard it, of course you should disregard it. Just as it's physically stricken from the record, so strike it from your mind and memory because it is not in the record. You should decide the case on what is in the record. The same thing is true of objections to questions that have been sustained by the Court. I ruled as a matter of law that the question is improper. Incidentally, that doesn't mean that the

lawyer's conduct is improper. And sometimes I'm even wrong. But in this court, I am right for these purposes. But you can't speculate on what the answer might have been had the witness been permitted to answer. Again, on the theory it is not in the record you can't assume that any fact incorporated in the lawyer's question is correct. So just disregard the question.

I used "inference" and "presumption" and I want to define it so we understand it completely.

An inference is a conclusion which reason and common sense lead the jury to draw from facts which have been established by the evidence in a case. And the example of that of course is the inference the jury may draw in arriving at a determination with circumstantial evidence. But the point is that that is discretionary. The jury may draw it.

However, a presumption is a conclusion which the jury must draw. And remains, prevails, and is not overcome unless proof is admitted into the case to contradict the conclusion. And the example of that of course is the presumption of innocence.

Now, you the jurors are the sole judges of the credibility of the witnesses. Which means the

believability of the testimony and the weight their testimony deserves. You have the duty to scrutinize the testimony given and the circumstances under which each witness testified and even matter in evidence which tend to show whether a witness is worthy of belief. Take into consideration the age and intelligence of the witness. Take into consideration his motive for testifying, why he is testifying, and his state of mind while testifying before you. Take into consideration the demeanor or the manner of the witness while on the witnese stand. Is he testifying directly or is he evasive?

Now, of course in making that determination, just use your good common sense. Witnesses sometimes, particularly on cross examination, are restricted in the way in which they may answer. And I told you during the trial that is because the cross-examiner has a right to control the examination. That doesn't mean feed the witness the answer. That means to manage it because the witness would be able to say anything he wanted on cross-examination and disregard the questions. We would have pure chaos and confusion.

In making the determination as to how the witness is answering, you take into consideration the

ability of the witness to observe the subject matter on which he is examined. Take into consideration whether the witness shall have impressed you as one having an accurate recollection of those matters. Take into consideration the relation each witness might bear to either side of the case. The manner in which each witness might be affected by the verdict in the case. Take into consideration the extent to which, if at all, each witness is either corroborated or contradicted by other evidence. These are some of the general guides that you should use in weighing the believability of testimony.

Of course, good common sense is the overriding rule. Experience in weighing the testimony. The kind of experience you used all your life in apprising versions of incidents or events. You know, you've done it, you've done it in your social life and with your children. You've done it with your respective spouses and friends. That is the kind of experience where sometimes you believe it, sometimes you are not sure, sometimes you would like to have some additional proof or some substantiation, sometimes you will accept it out of hand. These are general guides, use your common sense and experience in applying.

Now, the Government called two witnesses who were qualified as expert witnesses. Mr. Webb, who testified to some form of photograph identification, and Mr. Oliver, who testified as a fingerprint expert.

Now, when I found that they were qualified, and Mr. Cohn as a matter of fact conceded the qualifications of Mr. Oliver, I did nothing more than say, well, I find that you are qualified to express an opinion and therefore it may be submitted to the jury. If I had found him not qualified you wouldn't have even heard him. But I make no determination as to the weight that you should give that expert. That is solely for you. And he should be judged like any other witness, by the guides I just indicated to you. The rules of evidence ordinarily do not permit a witness to testify as to opinions and conclusions. An exception to this rule exists as to those we call expert witnesses. Witnesses who by education and experience have become expert in some art, science, profession, or calling may state an opinion to relevant material matter in which they profess to be experts, and may also state their reasons for the opinion.

As I said, you should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you decide the opinion of an expert witness is not based on sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely.

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The law does not compel a defendant in a criminal case to take the witness stand and testify. No presumption of guilt may be raised and no unfavorable inference of any kind may be drawn in the failure of the defendant to testify. A defendant as previously charged may rely on the failure of the Government to prove its case. It would be improper for you to discuss the failure of the defendant to testify during your deliberations. You may not draw any unfavorable inference from the defendant's failure to offer any proof. I indicated to you that there is no obligation on the defendant to offer any proof. The test is whether the Government has proved its case beyond a reasonable doubt. There may be evidence in the case, and I am not quite sure, I think Mr. Cohn argued that there was if my memory serves me correctly that at some previous time prior to the time the witness took the stand he made a statement that was inconsistent with his testimony given at the trial.

Now, this evidence of a prior inconsistent statement was offered for the purpose of judging the credibility of the witness. Whether a prior statement is inconsistent with the testimony given by the witness is a fact question for you. You determine

whether he said something differently at a previous time. You also determine whether it is an inconsistency as to a material fact, and then you determine the effect it should have. I think your good common sense and experience will tell you that a variation in repeating a version of an event or incident is not always a factor in detracting from credibility. At times, it even adds to it. If someone repeated to you time and time again a version of what had happened and it was repeated in the exact language with the exact pauses and exact gestures you may very well be inclined to disbelieve the story because it may seem rehearsed. So there are certain variations that you recognize as being normal variations. And there are some that you recognize as being inconsistent.

Inconsistent statements you'll have a look at and determine whether it is material and you determine the weight it should be given.

Now, Mr. Wilbur Roland said that he was one of the participants in the bank robbery on January 10th, 1972. That classifies him as an accomplice. An accomplice does not become incompetent as a witness because of participation in a crime charged. The testimony of an accomplice alone if believed by the

Jury to be true beyond a reasonable doubt may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence.

However, the Jury should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict the defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony to be true beyond a reasonable doubt.

Some proof was offered that Mr. Roland was convicted of a felony. The testimony of a witness may be discredited by showing that the witness has been convicted of a felony. That is a crime punishable by imprisonment of a term of years.

Now, prior conviction does not render a witness incompetent to testify. But it is merely a circumstance which you may consider in determining the credibility of that witness. It is the province of the Jury to determine the weight to be given to any prior criminal conviction as impeachment.

If a witness testified before you under oath falsely, intentionally, and as to a material fact, you may disregard all that witness' testimony on the theory that the witness is unworthy of belief. On the

other hand, to underscore the wide discretion the Jury has, you may choose to reject that portion of the testimony that you recognize as being probably false and except any other portion of it that you believe to be true.

Now, we come to the indictment. I read this indictment to you once before. I will read it again. This time I will read the entire two counts even though you'll recognize that the second count is repetitious of the first except for the last phrase. When I present this case to you I am going to give it to you in reverse order. I am going to ask you to consider the second count first and then make a determination on the second count and if you find the defendant not guilty then consider the first count. And if you find the defendant not guilty on that count then it is not guilty on both counts.

Count One reads:

"On or about the 10th day of January 1972, within the Eastern District of New York, the defendant Henry Stuart Brown knowingly, willfully and feloniously, by force, violence and intimidation, took approximately $14,748 in United States currency from the persons and presence of employees of the Bankers Trust Company,

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896 DeKalb Avenue, Brooklyn, New York, which money was in the care, custody, control, management and possession of the said Bankers Trust Company, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation."

A violation of Title 18, U.S.C, Section 2113(a) and Section 2.

And Count Two, as I say, I will read word for word is the same except for the last statement.

Count Two reads as follows:

"On or about the 10th day of January, 1972, within the Eastern District of New York, the defendant Henry Stuart Brown knowingly, willfully and feloniously by force, violence and intimidation, took approximately $14,748 in United States currency from the persons and presence of employees of the Bankers Trust Company, 896 DeKalb Avenue, Brooklyn, New York, which money was in the care, custody, control, management and possession of the said Bankers Trust Company, the deposits of which bank were then and there insured by the Federal Deposits Insurance Corporation."

This is the new portion:

"And in the comission of these acts, the defendant Henry Stuart Brown assualted and placed in

jeopardy the lives of employees of the said Bankers Trust Company, by the use of a dangerous weapon."

A violation of Title 18, U.S.C, Section 2113(d) and Section 2.

First, in considering the guilt or innocence of the defendant Henry Stuart Brown, you must understand that only Henry Stuart Brown is before you on this charge and no other. The other participants are not before you, so you judge whether the Government sustained its burden of proof as to this defendant and only on this charge, nothing else.

Again, I say the indictment is only the means by which a defendant is brought into Court. It is no proof of the charges contained in the indictment. The proof must come from the evidence in the case. As I said, the testimony, the exhibits, the stipulations of facts and the facts judicially noted by the Court.

Now, the Government must prove beyond a reasonable doubt as to Count One the following four elements:

One, that on the tenth day of January, 1972, the defendant Henry Stuart Brown took approximately $14,748 from the persons or presence of the tellers of the Bankers Trust Company at 896 DeKalb Avenue,

Brooklyn, New York which money belonged to or was in the care, custody, control, management or possession of the Bankers Trust Company. That is the first element.

Two, the act of taking such money by force and violence or by intimidation.

Three, doing such acts knowingly and willfully; and Four, that the Bankers Trust Company was a banking institution, the deposits of which were insured by the Federal Deposit Insurance Corporation at the time of the offense alleged in Count One.

Now, Federal criminal law is codified, it is in books. And Title 18 is known as Crime and Criminal Procedure. It is the Congress that decides what shall be a crime, what conduct is prohibited as criminal. And under 2113(a) referred to in Count One, it is defined as follows: "Whoever by force and violence or by intimidation takes or attempts to take from the person or presence of another any property or money in the care, custody, control, management, or possession of any bank, is guilty of a crime." Then, "bank" is defined in Subdivision F as: "any member of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking

institution or organization operating under the laws of the United States and any bank deposits of which are insured by the Federal Deposit Insurance Corporation." You'll recognize some of the language of the statute finds its way into the count that is charged.

Now, the grave crime in Count Two is found in Subdivision (d) of the same. In other words, something more to make it a graver offense is added to Section (a) and it says in part: "whoever in committing any offense defined in Subdivision (a) assaults any person or puts in the jeopardy the life of any person by the use of a dangerous weapon or device violates (d)."

So I will now give you the essential elements of the crime charged in Count Two and show you where the difference is. Exactly as in Count One, the Government must prove all the four charges and then the fifth is added. The Government must prove beyond a reasonable doubt that on or about January 10, 1972, the defendant Henry Stuart Brown knowingly and willfully -- we will leave knowingly and willfully out because I want that as a separate element. The defendant Henry Stuart Brown took approximately $14,748 from the person and presence of the tellers

of the Bankers Trust Company at 896 DeKalb Avenue, Brooklyn which money belonged to our was in the care, custody, control, management and possession of the said bank; two, the act of taking such money by force and violence or by intimidation; three, doing the act knowingly and willfully; four, that the Bankers Trust Company was a banking institution, the deposits of which were insured by the Federal Deposit Insurance Corporation at the time of the offense; and five, which is the additional element, the act of assaulting or putting in jeopardy the life of any person by the use of a dangerous weapon or device while engaged in committing the bank robbery.

Now, the Government's position is not that Mr. Brown necessarily performed all of the acts necessary to prove the robbery charged in the second count. They say that he participated, that he had a gun, that he was the man who vaulted the counter and scooped up the money described as the number one man throughout this testimony.

It isn't necessary for the Government to prove that the defendant Henry Stuart Brown committed every act to sustain the crime charged.

Section 2, and that's why Section 2 is added to

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the indictment, provides -- that is Title 18, and I am reading the statute: "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

So that if the Government proved beyond a reasonable doubt that someone other than Henry Brown put in jeopardy the lives of any person in the commission of the robbery but also proved that Mr. Brown knowingly and willfully participated in the commission of the robbery, and his participation was willfull -- in other words voluntary and intentional, then he could be charged on that particular element or any other element of the crime charged as an aider and abetor to be charged as a principal.

I think at this point some definition of some of the terms I just used is in order. I used "knowingly and willfully." The statute's language is "by force or violence or intimidation." The Government must prove that the acts were knowingly and willfully performed.

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THE COURT: (Continuing) Every crime is composed of two essential elements: One, the act itself, and the other what we call criminal intent. And to describe criminal intent we use the language "knowingly and willfully." Knowingly means a person was aware of what he was doing. He wasn't about to be doing it out of some mistake, inadvertance. Willfully means that the act was performed intentionally, and knowing that it was a violation of law.

The phrase "by force and violence" is used in the section, and it's an element which the Government must prove beyond a reasonable doubt. Force or violence or by intimidation. Force and violence means that there is physical force used, and that it wasn't a peaceful taking, as an embezzlement, and otherwise destructive taking. It means that the Government must prove that the taking was by force or violence or by intimidation.

If you take by intimidation it means to willfully take by putting in fear of bodily harm.

Now, the proof must be that the Defendant did it knowingly and willfully, put the persons in fear of bodily harm, and that the fear was real and actual, they were frightened, and not just a response of

peculiar timidity on the part of the person.

You can determine from the evidence of what was said and done a the time as to whether there was force and violence, or whether there was intimidation.

Now, the other element, which is found only in the second count, which is the graver count, is putting in jeopardy the lives of any person, and that means that the Government must prove beyond a reasonable doubt that the weapon used in this robbery was operable and loaded and was capable of inflicting serious harm or even death.

Now, I think Mr. Cohn stated it well when he said the real question here is whether the perpetrator who was carrying the shopping bag, and described as number one throughout the trial, was Henry Stuart Brown and that is the critical question. The Government must prove that beyond a reasonable doubt.

You will shortly be excused to discuss the matter before you. Each one of you must decide the case for himself or herself, but you must decide it on the evidence, free of all bias and free of all prejudice and free of all sympathy.

The deliberative process by the jury is one of

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exchange of views in discussing the evidence. It's supposed to be improper for a juror to take a position at the outset, or for that matter during any part of the deliberation, and say"I refuse to discuss the evidence with you." Each juror has the obligation of discussing the evidence with the other jurors and if a tentative determination arrived at seems at that time not in accordance with the evidence, then to change it.

Now, do not abandon a determination that you believe in based on the evidence solely for the purpose of unanimity.

The other side of the picture is the juror who comes into the jury room ready to go along with the majority. That too is wrong. Each juror has the obligation of going over the evidence, discussing with their fellow jurors, attempting to arrive at a unanimous verdict if it can be done so consistent with the evidence.

During your deliberations you may have occasion to communicate with the Court. You can do so through your forman. He'll write all the notes to me. If your want any part of the evidence, try to identify the evidence either through the witness or the subject

matter or both, if you can.

Don't tell me during your deliberations how you stand at any time during your deliberations. These are secret deliberations. Don't tell me "It's supposed to be ten to two," "eleven to one." I'm not interested. When you have arrived at a verdict and the verdict of course must be the unanimous verdict of the twelve jurors who will deliberate, then just write me a note and tell me "We have arrived at a verdict." Don't tell me what the verdict is.

The first time the verdict is given is in open Court, and it is recorded by the Court Reporter.

I will submit, as I said to you, the second count first, because if you arrive at a verdict on the second count and the verdict is guilty, then you don't consider count one. And I will ask the foreman to stand, and in effect I will say "In the case of United States of America against Henry Stuart Brown how do you find the Defendant Henry Stuart Brown as to count two?" And if you say "guilty," then I won't ask any questions. If you say "not guilty," then I'll say "how do you find the Defendant Henry Stuart Brown as to count one?"

Now, you can either there report guilty or not

guilty. And you will sit down. I'll turn to juror number two, and say "You've heard the verdict that was rendered by the foreman, is that your verdict?" I will go to three, four, five, all the way to twelve, and ask each juror if that's their verdict. If all agree in open court, then that becomes the verdict.

Now, at this time I'm going to excuse the jury. Don't start your deliberations yet. I want to discuss the matter with counsel.

(Jury out.)

THE COURT: Mr. Clarey, any exceptions or omissions?

MR. CLAREY: Your Honor, I believe an implication in your charge that there was an inconsistent statement proved by Mr. Cohn. I could be wrong, but -

THE COURT: I know he argued. I found it hard to find a prior inconsistent statement, but he argued it and I thought I'd better give the charge on it.

And incidentally, when the requests were made yesterday, you didn't object to that. He has it in his requests.

MR. CLAREY: I'm sorry, I didn't see it in the requests.

THE COURT: It's in there.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

HENRY STUART BROWN, : 73 CR 960

Defendant. :

----------x

United States Courthouse
Brooklyn, New York
February 1, 1974
10:00 a.m.

B e f o r e:

HONORABLE JACOB MISHLER, U.S.D.J.

HENRI LE GENDRE
ACTING OFFICIAL COURT REPORTER

APPEARANCES:

EDWARD J. BOYD, ESQ.,
United States Attorney for the
Eastern District of New York

BY: ROBERT CLAREY, ESQ.,
Assistant United States Attorney

FREDERICK H. COHN, ESQ.,
Attorney for Defendant

* * * *

THE CLERK: United States of America versus Henry Stuart Brown.

THE COURT: An order granting order of fingerprints.

MR. CLAREY: I have no objection to that.

THE COURT: The motion is granted, just submit an authorization on our form F. We have the form.

MR. CLAREY: Do you have a name of a fingerprint expert right now?

MR. COHN: I'm probably going to contact the people.

If you want to have me have a person certain.

THE COURT: My order doesn't require it, it's none of the Government's business. You just show the expert or you probably have a copy of it.

MR. CLAREY: I don't personally have one, I'll get it from the FBI lab, let's say within a week, possibly two weeks.

THE COURT: Suppressing the use of a statement allegedly obtained by defendant -- what is the statement?

MR. CLAREY: As I indicated in my response, I may use the statement, I may not. It's not definite that I'll use it. It's a statement that is rarely combined -- verbal statement made by the defendant at

the penitentiary when confronted with the photograph from the surveillance camera.

He indicated that he --

MR. COHN: He said, "I'd better get out of here." That's what he said.

THE COURT: Is that what he said or what he allegedly said?

MR. CLAREY: Apparently from Mr. Cohn's papers there is a messiah question.

MR. COHN: Your Honor, I wrote to Mr. Clarey for an informal discovery proceeding. My letter to him and his response to me are appended to the discovery motion as Exhibit A and B; to the general discovery motion, not to the messiah motion.

THE COURT: Is that what you said by your response?

MR. CLAREY: That's what I said by my response. What is said by my letter -- my letter in response -- number 14. He became very nervous and agitated and said, "I better get out of here."

I offered it only by reason of discovery. I haven't planned my complete trial strategy. I'm not sure I'll offer it on my direct case, it's possible that I will.

MR. COHN: Not reaching the evidentiary case --

THE COURT: "I better get out of here." Is that a confession?

MR. CLAREY: It's ambiguous, it's not a full confession. It could be considered as an admission of guilt or consciousness of guilty.

MR. COHN: It could be the same thing as saying, I better get my lawyer, which is not an admission of anything, but that's an evidentiary question as opposed to a suppression question.

MR. CLAREY: We can take that up if I intend to offer it on a very brief hearing.

THE COURT: I think so. I think there is grave doubt whether it would be offered. If it is offered of course it's always up to the jury to determine whether any statement made is an admission.

MR. COHN: The thrust of this motion will be whether or not the defendant was represented by counsel at the time of this admission.

THE COURT: That doesn't matter if the Government doesn't offer it.

MR. COHN: But the Government never told me that so I feel duty bound to make a motion.

THE COURT: You understand, Mr. Clarey, that before you offer it you advise the Court that I indicated that I would hold a hearing and rule on the

admissibility of the statement, all right?

MR. CLAREY: Yes, your Honor.

THE COURT: Now, what next?

MR. CLAREY: You can see by my response I've provided a great deal of information to Mr. Cohn. His first request is what is tantamount to a list of witnesses.

I will indicate I decline then and I decline now. We are up to the general discovery motion.

THE COURT: Do you intend to use the testimony of an informant?

MR. CLAREY: I would rather not say at this time one way or the other. I wouldn't say whether I made that determination at the present time. However, if I do use the testimony of an informant, I assume that under Brady versus Maryland --

MR. COHN: The question is when I get that material, so when I come in I have to read off a piece of paper and come in cold.

THE COURT: I will not direct the Government to turn over matters that they are not required to turn over; that was made very clear in United States versus Perceval, very recently.

I urge the Government to turn over matters that they are not required to turn over, that may very well

expedite the trial but it's the Government that will make that evaluation because particularly in cases like this, I think the Government has a duty to protect their witnesses.

MR. COHN: I am sure the Court is not inferring if I have a list of witnesses that I would go out and do them some injury, and in my affidavit I've volunteered not even to tell my clients who they are.

THE COURT: Why even take the chance.

MR. COHN: I think due process requires wherever --

THE COURT: Recent trials of black militants, informants have psychiatric histories which may go beyond the criminal record sheet and so forth. But who are these informants? Very often then are part of the black militant organization.

MR. COHN: But we don't know who they are. I tried a case not long ago where the informant spoke regularly with God and her mother and her conversations were not privy to her but became a question on the trial.

THE COURT: Why should the Government take a chance on having one of its witnesses injured by someone who is one of the class that you describe?

MR. COHN: First of all, my client is under very tight security in jail. I tell the Court I won't tell who they are.

THE COURT: I don't doubt it, but even for your own protection I would say if there is that possibility the lawyer shouldn't even ask for it.

MR. COHN: I view my obligation, one to my client and two, protect his legal interest; and I think with a man who has been in jail for two years who was under sentence and certainly is not going to get out of jail before this trial and even well after the trial, no matter what the result, who cannot assist in his own defense; who is on a murder case four days a week, full time, I am entitled as his attorney, to every assistance of the Court and the United States Attorney's Office in developing information which may assist in a defense in a very, very serious case.

THE COURT: And if the information comes as late as the trial itself you will be protected in that you will be given ample opportunity to investigate any information you regard as new and surprising, and that's the only way I know to protect the lives of the clients and the witnesses.

MR. COHN: I don't think the life on any Government witness would be endangered or my own life, or Mr. Clancy's life if I was given that information.

THE COURT: The chances are you are right, I just would rather believe that there is always the

other possibility.

MR. CLAREY: Demand three and four, beginning on page four of Mr. Cohn's papers are a little bit vague.

I suspect he's asking for all of the FBI reports, any reports on the Black Liberation Army.

THE COURT: You say you are entitled to know why the defense was indicted.

MR. COHN: Late. Why he was indicted 15 months later.

THE COURT: That goes to your motion to dismiss.

MR. COHN: Suppose your Honor as again has happened in trials of black militants and unfortunately or fortunately, I've had some contact as your Honor indeed knows.

Suppose a member of the internal security squad of the FBI takes the stand and testifies about tracking down Mr. Brown and about what he may or may not have done, or what he may or may not have said.

THE COURT: I won't allow it.

MR. CLAREY: I have no intention of quoting any member of the internal security squad.

MR. COHN: Perhaps I want to question in terms of a motive to lie, FBI motive to lie.

THE COURT: I'm going to make sure that you don't

make this a political issue.

Mr. Brown is charged with robbing a bank and nothing else.

MR. COHN: There is an extensive file on Mr. Brown somewhere in the FBI file and it's well known the Court could take judicial notice that FBI agents and police agents in general do not like Black Liberation Army members.

I am entitled to go into any motivation to lie that they have. I don't want to get up here in front of a jury and antagonize the Court -- go on a fishing expedition where I have no underlying questions of the basis.

The only way I can investigate what's going on is having some of the reports on Mr. Brown to find out what they have on him, what they think they have on him and go in with him in depth as to what is a lie and what isn't.

I can't do that if I came up and asked a question to an FBI agent that presupposes with a good faith basis.

In fact the Court would have me under the cover and rightfully so. I have to have something on which to base those kind of questions and it's indeed possible that the FBI if they are not outright lying --

I'm not trying to get into who is right, I don't care. The question on the criminal trial is how can I explore that and lay that out for a jury.

THE COURT: You want to make sure that that FBI agent will testify and then will find out what he will testify to and this might very well be heard outside the hearing of the jury to determine whether the defendant is attempting to bring in collateral matters, I don't say you will, but there is an awful temptation to do it and I'll use every effort at my command and all the experience I have in keeping out matters that don't belong in this trial.

MR. COHN: Your Honor recognizes by this colloquy that this is a very sensitive area where we might border on it.

THE COURT: It isn't. It depends on whether lawyers want to make it that way.

MR. COHN: It's my experience, although certainly I don't have the years at the bar and bench that your Honor does -- that indeed police, agents, have a tendency to make mountains out of molehills as far as black militants are concerned, that's understating it.

THE COURT: You are assuming, first, Mr. Cohn, that an FBI agent is going to give testimony connecting this defendant to a bank robbery, that may or may not

be so.

I can only see one area where an FBI agent will and that's the fingerprint expert. He's going to say because of these curves, valleys and hills, this is Henry Brown's fingerprint.

That's the best he can say. Do you think I'll allow you to ask whether Henry Brown is a black militant --

MR. COHN: Does your Honor think that I am not going to develop an area why it took four months --

THE COURT: I'll stop you.

MR. COHN: I'm going to respectfully try.

THE COURT: You try and I won't allow it. That's just the kind of attempt that I say does not belong in this trial; testimony is technical in that -- not the opportunity to bring in political considerations.

MR. COHN: If I may, I don't want to belabor this until doomsday. I want to make it perfectly clear what my political position is..

They suspect it three days before the robbery -- we know that because Mr. Clarey tells us in his letter response to us they went with a picture of Henry Brown to his Uncle and said, "Do you recognize this man."

They went to his Uncle. Henry Brown has had an FBI record which is also appended to the papers -- eight or ten years -- and Henry Brown's records were

surely on file in February of 1972. And they sent these fingerprints down and they come back theycan't identify him in June, June 5.

THE COURT: Who is they?

MR. COHN: The FBI sent these fingerprints down to the fingerprint identification bureau of the FBI.

MR. CLAREY: The fingerprints were not compared to Henry Brown.

MR. COHN: If I may finish my argument.

MR. CLAREY: You are making misstatements. I think it's a waste of time.

THE COURT: I don't allow colloquy between lawyers.

MR. COHN: They came back on June 5, a supplemental report comes back appended to those papers saying now, three months later, we tell you this is Henry Brown.

I think I'm entitled to ask an FBI agent in challenging the identity of those fingerprints, why.

THE COURT: Objection sustained.

I'll do it at the trial before you ask those questions. I'll ask that we excuse the jury.

MR. COHN: I'll do anything to protect the trial and the record.

THE COURT: And you'll protect the record because from the way these trials go, the typical trial is no matter what -- an individual that belongs to black militant party is charged with -- some lawyers, I don't say you, Mr. Cohn, you haven't tried a case before me.

MR. COHN: I have indeed, some years ago.

THE COURT: Maybe you didn't have the moustache but I will not allow every trial to be turned into a political trial.

Sure, you are entitled to know motive for testifying and surely you are entitled to know whether a witness is anonymous, but that's not an excuse for bringing in every emotional issue in a trial. When we talk about fair trial we talk about a trial without those emotions and issues.

MR. COHN: Your Honor --

THE COURT: If this were a political trial, if they were charging Mr. Brown with engaging in some kind of activity on behalf of the Black Liberation Army front I would say, sure it belongs there, but this is bank robbery.

MR. COHN: I just suggest to the Court most respectfully, while I understand your affairs on behalf of justice and the Court, you have to understand my

affair that we can sterilize a trial too much for a jury to understand what essentially is going on in the minds of some witnesses, and unfortunately that's all we have.

I don't want to turn this into a shouting match, Henry Brown and the witnesses. I want to have an orderly proceeding, but I do think, and I'll strive for in appropriate manner, some way to explore these matters.

I'll ask the Court if the Court is going to deny my motion to direct the U.S. Attorney to have that material available unless it is called for.

THE COURT: I don't know what that means, have that material. It's so voluminous. I don't know if it's possible to get what Mr. Cohn calls all the material; the material involving Henry Brown, the Black Liberation Army, that might very well be every investigation made by every state in the union of the territories, every agency of the federal government.

MR. COHN: I can't account for the FBI, they don't file time sheets with me. I say we have to protect, for whatever the reasons, the rights of a criminal defendant who faces 20 years in jail or 25, if that requires storing some papers in a room in Court which could perhaps be better occupied or

otherwise occupied, I suggest that that is the position we should take.

THE COURT: Suppose we are asking the impossible.

MR. COHN: Nobody knows.

THE COURT: You never know when something is impossible.

MR. COHN: I stand here as a private attorney, no huge staff like the FBI and U.S. Attorney's Office, asking them to tell us. If he says it's impossible, there is no truck large enough --

THE COURT: How could the Government supply you with everything that you ask for?

MR. COHN: I am asking at the very least, the Government search its files; the FBI finds things. It must have a filing system; recent disclosures leads one to doubt it.

THE COURT: Do you know what they have on the Black Liberation Army, Mr. Clarey?

MR. CLAREY: Do I know what the FBI has? I'm sure I don't know everything.

THE COURT: We are not talking about Henry Brown.

MR. COHN: I'm talking about Henry Brown and the Black Liberation Army. I'm not talking about everything they have on the Black Liberation Army; everything they have on Henry Brown as opposed to

Twyman, Meyers or Gunga Din.

THE COURT: I don't know Twyman, Meyers or Gunga Din; and Gunga Din never existed.

MR. CLAREY: All I have on the Black Liberation Army, I have three bank robbery cases and I have reports concerning those bank robbers and that's all I have.

THE COURT: Did he steal all this money to help the Black Liberation Army; is that what you want to bring into the trial?

MR. COHN: I'm not admitting he stole anything.

THE COURT: If he did --

MR. CLAREY: This is the purpose of the Black Liberation Army, I read it in the papers.

THE COURT: That's the kind of testimony I will not permit.

MR. COHN: I understand that. I hope at least I'm half-way competent.

THE COURT: The impression that I have is that you are very competent.

MR. COHN: Your Honor recognizes that that kind of testimony cuts two ways.

THE COURT: I don't know the purpose of your motion.

MR. COHN: Suppose for instance it would be

legitimate from the information we get, I don't know, I just don't know; to try and prove up that the FBI had a theory just as you have enunciated, that the Black Liberation Army was running around robbing banks to support the revolution, they start therefore with two and a half strikes.

THE COURT: Assume Henry Brown committed the robbery -- I'll assume your assumption is all wrong, they get the right man, they have the picture and fingerprint, what reason does it make for arresting Henry Brown.

MR. COHN: The problem is that the picture of course, according to Mr. Clarey's disclosure to me, has never been identified and the fingerprints are questionable.

THE COURT: You may be wrong in your assumption.

MR. COHN: I may indeed be.

THE COURT: Why not wait for the trial.

MR. COHN: I believe I am competent, I would like to have it prepared in advance. I don't think it's fair for a mere mortal to sit at counsel table and have a decision affecting the balance of a young man's life, if indeed there is a better way to do it and I think there is; and I think that if counsel respect the Court as I do, counsel should be trusted

at least until demonstrated otherwise with an orderly investigation of material which is important to the defense of a criminal defendant.

THE COURT: Mr. Cohn, if I learned one thing sitting on this bench, that the question is presented on the issues that are in the case are very very difficult; but questions on matters that are not in the case or may not be in the case are impossible to decide.

I don't know what is in this case.

MR. COHN: Neither do I and I'm his lawyer.

THE COURT: We do know what is in this case, but I don't know that these matters are in this case.

I know that he's charged with robbing a certain bank on a certain day, and I am ready to rule on any of those issues, but I'm not ready to rule on whether the defendant will be allowed to ask questions concerning the defendants relationship with the Black Liberation Front. I don't know what testimony is going to be offered, and I say to you if it's only the FBI agent, special agent fingerprint man who is giving nothing more than expert opinion, you will not be allowed to ask questions on whether he says that this curve is the same as that curve on the known and unknown print; that his testimony must therefore

be colored because he knows that Mr. Brown is a member of the Black Liberation Front.

MR. COHN: I'm merely asking at this point without waiving my prior request, that the Court ask Mr. Clarey that he'll have such material available if it becomes pertinent.

THE COURT: I ask Mr. Clarey to do his best if he knows what Mr. Cohn is asking for, and I know you are definite in your own mind. I don't criticize you for the manner of request.

I just feel it's a very very difficult task to find out everything. I don't think he's asking for what the FBI has, it may be internal revenue, customs, it may be drug enforcement administration; it may be the state investigation agency.

MR. COHN: I'll orally limit it here that the internal security division or any successor thereto of the Federal Bureau of Investigation, I think it's called group five and it works from directly with Mr. Guy Goodwin of the Justice Department.

THE COURT: Now, you have it.

MR. CLAREY: If I may make a statement?

THE COURT: See if you can bring that material in.

MR. CLAREY: I doubt it very much. I have

worked only with agents of the bank robbery squad in New York; Agent Jim Murray, Bob Macartin and these are the agents who investigated this series of bank robberies in New York.

THE COURT: Do you expect an FBI agent to testify to the bank robbery?

MR. CLAREY: Not at the present time. Something may come up that would require an FBI agent to testify.

The only one I plan to call at the present time is the fingerprint expert. If there is a show up of a photograph or something to that affect that I'm not aware of, and then an FBI agent may testify to that, eye witnesses to the bank robbery.

THE COURT: In the light of that statement, though I would ask Mr. Clarey to bring in whatever group five has on Henry Brown, I doubt very very much --

MR. CLAREY: I'll go so far as to ask Agent Murphy if he knows about group five and if group five has been involved in the case.

THE COURT: Ask him to bring the stuff in. Mr. Cohn is going to try to bring it in and I'm going to try and bring it out and I would like to have the stuff here at the time, and I would like to examine it and if I don't think it is producible seal it.

MR. CLAREY: If we could make less than a Court order I'll investigate and I'll bring --

THE COURT: Advise me as to what is available and how difficult it is to get. He's only asking for group five.

MR. COHN: I think it's group five.

THE COURT: It might be another group number.

MR. COHN: For Mr. Clarey's benefit, I believe Mr. Macartin was the head of it for some time.

MR. CLAREY: I know Agent Macartin.

THE COURT: State the name of the third person alleged to be a co-actor on January 10, 1972.

MR. CLAREY: I'll state now on the record that we do not know who the third party is with any certainty. There may be as many as 20 suspects, some of whom are members of the Black Liberation Army and some are not. We just don't know who the third person is then at this time. If I knew I probably would have indicted him.

THE COURT: Of course, any help the Government can get, it welcomes.

MR. CLAREY: Demand number six I would offer the fingerprint material. I would like to be apprised of the results of the test in an equal manner. AS I advised Mr. Cohn of our results I don't think

Mr. Cohen should spring something on me at the trial, if the fingerprint expert disagrees with my expert.

THE COURT: Don't you think that's fair?

MR. COHN: Sure. I would do that but I would like to at least attempt not to deliver the name of my fingerprint expert to Mr. Clarey.

What I saw happen in a State Court proceeding, the State Court subpoenaed --

MR. CLAREY: If he came to the same conclusion.

THE COURT: I can tell you what happens in a civil case. I don't know that this ever happened in a criminal case, but in a civil case I have had one party subpoenaed experts of the other and it was only a question of fee.

You are not giving an expert who normally gets $500, $1000 to testify, $20 plus 10 cents a mile. But in a criminal matter I am not sure. I don't see why it shouldn't be true in a criminal matter because it goes to guilt or innocence; why should the U.S. Attorney in the face of the Fifth Amendment be able to subpoena a -- that right is only with defendants.

MR. COHN: And with the defendant's attorney. Suppose he subpoenaed me and asked me what the defendant told me?

THE COURT: That's right.

MR. COHN: This is a man supplied by me.

THE COURT: Thw real work product -- Pitman against Taylor.

MR. COHN: A civil case.

THE COURT: Whatever logic applies in a criminal case and vice versa.

MR. COHN: In that case I'm entitled to all his witnesses.

THE COURT: Except for the Constutitional right against self incrimination and the other rights even though that has been warded down under Harrison and Sims and Walters.

A trial is a trial and the only difference between a civil and criminal trial, except for burden of proof, are the Constitutional rights afforded defendants in a criminal trial.

MR. COHN: And I think the Constitution forbids him calling my expert.

THE COURT: Suppose a friend who didn't want to testify saw the crime committed; let's say suppose it was a relative and he subpoenaed that relative and asked the relative the question to testify. He had evidence, same thing goes for an expert. It's not the work product.

MR. COHN: If we have to cross that bridge we'll do it on full brief.

THE COURT: You release the fingerprints and turn them over and he does not have to give you the name of his expert.

However, if he wants the report -- that was the understanding --

MR. COHN: He could have the report with my fingerprint expert's name masked off.

THE COURT: How about that?

MR. CLAREY: I would certainly -- of course we can cross the bridge when we come to it. I would like a copy of the report.

MR. COHN: He can have it.

MR. CLAREY: I would attempt to subpoena the name of the expert. I would like to know the name of the expert because I wouldn't use him unless he agreed with my expert.

MR. COHN: I don't know what he's going to say.

THE COURT: Why don't you submit a memorandum, the right to subpoena the expert of a criminal offense. There is little doubt -- I don't recall researching it.

MR. CLAREY: I'll have a memorandum ready at the time.

MR. COHN: I can't quote Whitmore.

THE COURT: Now, the strange question is if you know the name of the witness, the expert witness, whether that cannot be extracted from you?

MR. COHN: If Mr. Clarey wants to muddy this record with that question I'm prepared to deal then with it.

THE COURT: I don't know whether that violates the lawyer-client relationship.

I wrote a long opinion in that Gambini case.

MR. COHN: I know the opinion, and I read it with great interest.

THE COURT: And you probably disagreed with it.

MR. COHN: I disagreed with parts of it.

MR. CLAREY: Which case was that?

THE COURT: That was a drug case Mr. Freid was in, where Lefcourt and Katz.

MR. COHN: I was a member of the firm.

THE COURT: Did not want to disclose the name of the person.

MR. COHN: Who paid the fee?

THE COURT: I had a lot of difficulty with that. All I can say is that the privilege is not as broad as Mr. Lefcourt and Katz argued.

Judge Frankel had written on it but I distinguish

Judge Frankel's case -- at any rate --

MR. COHN: That's a bridge I'm prepared to cross when we come to it.

THE COURT: By that time I shall have done a little more work on it too.

All right, we have gotten no place here so far.

MR. COHN: That's right, from my point of view; from Mr. Clarey's point of view we have gone a long way.

THE COURT: We haven't clearly resolved six.

MR. CLAREY: I thought six related to the name of the expert, not the name, but whether they would turn over the results.

THE COURT: The one thing I'm sure of they have the right to the fingerprints and I direct that they be turned over.

Now, what happens after that is something else.

MR. COHN: I will tell the Court that I will turn over the fingerprint report that I get back to the U.S. Attorney but I'll delete unless ordered to do otherwise, the name of the expert.

THE COURT: And I would take a memorandum on that. I'll not decide that on the bench.

MR. CLAREY: I have had it disclosed to me voluntarily. I didn't bother to use their chemist.

MR. COHN: Not be me.

THE COURT: What are we going to do about the claim, conversations concerning Henry Brown?

MR. CLAREY: I'm going to call a person in the Department of Justice this afternoon or Monday and see what cooperation he'll give me and I'll write to him a follow up letter.

THE COURT: I take nothing back with me and nothing is in the file other than what we talked about today and I'll forget most of it.

MR. CLAREY: Shall we order?

MR. COHN: I don't see any reason why.

THE COURT: Criminal justice act, United States Attorney orders it, send a copy to Mr. Cohn and file the original.

I'll be looking for an early trial, April 1, which I believe is a beacon date.

* * * *